



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 106 OF 2017

IN THE MATTER OF ARTICLES 19 AND 22(1), 2(b) AND 260 OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 162(2)(a) OF THE CONSTITUTION

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27(2), 41, 47(1), (2) OF THE CONSTITUTION

AND

IN THE MATTER OF THE THREATENED TERMINATION OF EMPLOYMENT WITHOUT SUBSTANTIVE AND PROCEDURAL FAIRNESS

AND

IN THE MATTER OF PART VI OF THE EMPLOYMENT ACT, CAP. 266 LAWS OF KENYA

BETWEEN

NAOMI NZILANI MWOLOLO.....PETITIONER

v

PRUDENTIAL GROUP LIMITED.....1ST RESPONDENT

EMPIRE MICROSYSTEMS LIMITED.....2ND RESPONDENT

PIONEER FSA LIMITED.....3RD RESPONDENT

AWALI TUMAINI INVESTMENT LTD....4TH RESPONDENT

RULING

1. Naomi Nzilani Mwololo (applicant) was offered the position of *Finance Manager* by Empire Microsystems Ltd (2nd Respondent) through a letter dated 13 October 2014.
2. The contract was for 3 years renewable on satisfactory performance and could be determined by the giving of 2 months' notice or pay in lieu of notice.
3. The contract therefore was due to lapse around 30 October 2017.
4. On or around 1 July 2017, the applicant gave notice of resignation to the 2nd Respondent's Chief Operating Officer, Josphat Mworira.
5. Instead of accepting the resignation, the Chief Operating Officer through an email dated 5 July 2017 advised the applicant to wait for her

contract to expire and use part of the remaining time as part of accumulated leave.

6. It appears that the applicant and the Chief Operating Officer engaged into some discussions which led to the Chief Operating Officer of the 2nd Respondent, now acting as the Group Managing Director of Prudential Group Ltd, (1st Respondent) offering her a contract through a letter dated 29 August 2017 as *Group Finance & Administration Manager* with it (1st Respondent).

7. The contract was to run for 2 years at a salary of Kshs 120,000/-.

8. The letter of offer for the position of *Group Finance & Administration Manager* requested the applicant to indicate acceptance within 5 days by signing on a copy thereof.

9. The applicant appended her signature to the offer on 8 September 2017.

10. On 27 October 2017, the Chief Executive Officer/Managing Director of Pioneer FSA Ltd (3rd Respondent) offered the applicant the position of *Finance Manager* with it (3rd Respondent) effective November 2017 at a salary of Kshs 100,000/-.

11. The offer letter for position of **Finance Manager** required the applicant to indicate acceptance of the offer within 5 days. The applicant did not signify acceptance of the offer.

12. There is an indication that discussions took place in respect of the terms of the offer for the position of *Finance Manager* and that the applicant sought the contract with the 1st Respondent to be produced.

13. In an email dated 21 November 2017, the 1st Respondent's Human Resource Manager informed the applicant that there was no valid contract with the 1st Respondent because the applicant had failed to return it for corrections and the management had already made a decision to transition the applicant to the 3rd Respondent.

14. According to an email dated 22 November 2017, the applicant declined to accept the offer for position of *Finance Manager* with the 3rd Respondent because the agreed salary had been set as Kshs 100,000/- net, and not consolidated as indicated in the offer letter.

15. The applicant also alerted the 3rd Respondent that her contract with the 1st Respondent had not been brought to an end legally. There were other reasons given by the applicant for declining to accept the offer.

16. On 29 November 2017, the Human Resources Manager sent an email to the applicant to inform her that since she had declined to accept the offer to serve the 3rd Respondent as *Finance Manager* within 5 days, the position would be advertised. The email further advised her to proceed on annual leave, that she would be paid 1 month salary in lieu of notice and that she should clear before 5 December 2017.

17. On 8 December 2017, the applicant moved Court alleging that the unilateral action by the Respondents to alter the terms and conditions of service was in violation of the right to fair labour practices, right to fair administrative action and discriminatory.

18. The Petition was accompanied with a motion under certificate of urgency seeking

1. ...

2) **THAT** an injunction do issue restraining the Respondents by themselves or through their agents, servants, employees or any person acting on their behest from terminating, altering or reviewing any term of the petitioners employment pending the *inter partes* hearing of the application.

3) **THAT** an injunction do issue restraining the Respondents by themselves or through their agents, servants, employees or any person acting on their behest from terminating, altering or reviewing any term of the petitioners employment pending the *inter partes* hearing of this suit.

4) **THAT** the costs be provided for.

19. Abuodha J before whom the application was placed certified the application urgent, and also issued an order in terms of order 2.

20. The Respondents filed a replying affidavit in opposition to the application on 15 January 2018, and the Court took arguments on 24 January 2018.

21. The Court has given due consideration to the arguments and the facts as presented which included the pregnancy of the applicant who is presently out of a livelihood.

22. It is universally acknowledged that to be lawful, a variation of the terms of a contract of employment ought to be mutual and that consent to the variation may be express or implied (see *Harlow v Artemis Ltd* (2008) IRLR 629, *Rigby v Ferodo Ltd* (1987) IRLR 516).

23. A unilateral variation would therefore amount to breach of contract or repudiation of contract (see *Security and Facilities Division v*

Hayes (2001) IRLR 81.

24. The principal remedies in such cases, would in my view be *a declaration, an injunction, damages and/or compensation* where constructive dismissal is demonstrated. The applicant has sought both a declaration and injunctive relief in the Petition.

25. In the motion, the applicant seeks an injunctive relief at the interlocutory stage herein pending the hearing and determination of the Petition.

26. Such a relief in an ordinary employment contract where the employer has shown an indication that the contract has come to an end (email of 29 November 2017) would not be legally prudent as it may amount to reinstatement before a hearing on the merits.

27. Further, the injunctive relief sought by the applicant is in the nature of an order for specific performance and considering that there is a dispute as to the existence of a valid and enforceable contract, the question is still at large and must wait for testing and proof of the facts.

28. There is a serious risk if the Court were to make determination of disputed facts which ought to await the determination of the Petition on the merits at an interlocutory stage, thus tying the hands of the Court which will ultimately hear the Petition, and therefore the Court will only address its mind to the law on variation or alteration of a contract of employment and appropriate remedies in such cases.

29. Reinstatement is now one of the primary remedies this Court can order, and on terms, including no loss of benefits. The Court can also order re-engagement in appropriate case in lieu of compensation.

30. If the Court were to find for the applicant that reinstatement would be an appropriate and effective remedy, there would be no reason not to order it after a hearing on the merits.

31. In the view of the Court, this is therefore not an appropriate case to extend the *ex parte* orders granted or to maintain the status quo pending hearing of the Petition, as it is clear the Respondents have indicated an intention to bring the contract(s) if any, to an end through their email of 29 November 2017.

32. The Court therefore declines the invitation by the applicant and orders that the application dated 8 December 2017 be dismissed with costs in the cause.

33. In order to achieve a proportionate determination of the Petition, the Court gives the following directions

(a) Respondents to file and serve answers/responses to the Petition on or before 23 February 2018.

(b) Petitioner to file and serve any replies if necessary on or before 2 March 2018.

(c) Mention on 2 March 2018 for further directions.

Delivered, dated and signed in Nairobi on this 9th day of February 2018.

Radido Stephen

Judge

Appearances

For applicant Mr. Thiongo instructed by Githinji & Koki Advocates

For Respondents Ms. Alogo instructed by J.M. Jengo & Co. Advocates

Court Assistant Lindsey