



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2490 OF 2017

LOUIS ONYANGO OWOKO

CLAIMANT

v

KENYA RAILWAYS CORPORATION

RESPONDENT

RULING

1. On 11 August 2016, Louis Onyango Owoko (applicant) who was serving as the Treasury Manager with the Kenya Railways Corporation (Respondent) wrote a memo to the General Manager, Finance advising him that he had discovered fraud and that an Accounts Assistant responsible had disappeared from work.
2. On 22 August 2016, the Managing Director of the Respondent interdicted the applicant from duty to facilitate investigations into allegations of embezzlement of funds.
3. The interdiction alleged wilful neglect amounting to gross misconduct on the part of the applicant.
4. After completion of the investigations, the Respondent's Managing Director wrote to the applicant on 18 November 2016 asking him to show cause within 3 days why disciplinary action should not be taken against him for wilful neglect amounting to gross misconduct.
5. The applicant responded to the show cause on 7 December 2016, and on 9 October 2017 he was invited to appear before the Respondent's Board for an oral hearing.
6. The applicant made written submissions in response to the invitation.
7. On 5 December 2017, the Respondent wrote to the applicant informing him that the Board had resolved that he be demoted to the position of *Assistant Treasury Manager* from grade M3 to grade M4 and that he be surcharged the equivalent of 30% of the misappropriated funds (Kshs 504,135/- out of Kshs 1,680,450/-).
8. On 21 December 2017, the applicant moved Court under certificate of urgency seeking orders

1. ...

2. ...(spent)

3. **THAT** pending the hearing *interpartes* and determination of the main suit the Respondent, its Board, officers, and/or agents be and is hereby restrained from implementing the decision of demotion and surcharge made by the Board on 01st November 2017.

4. (spent)

5. **THAT** pending the hearing *interpartes* and determination of the main suit the Respondent, its Board, officers, and/or agents be and is hereby ordered to reinstate the Claimant to his original position of Treasury Manager with full pay, allowances and other benefits as well as access to the Respondent's system and other resources necessary for the Claimant's performance of his employment duties.

6. **THAT** pending the hearing *interpartes* and determination of the main suit the Respondent, its Board, officers, and/or agents be and is hereby restrained from demoting or transferring the Claimant, terminating the employment contract of the Claimant or in any manner interfering with the terms and conditions of the employment contract of the Claimant as negotiated on 14th June 2010 when the Claimant was hired by the Respondent.

7. **THAT** costs for this application be in the cause.

9. When the application was placed before the Court *ex parte* on 21 December 2017, the Court stayed the demotion of the applicant and directed that the application be served for *inter partes* hearing on 5 February 2018.

10. By 5 February 2018, the Respondent had not filed any response in opposition to the application, and the Court directed it to file and serve the responses on or before 9 February 2018 in readiness for a hearing on 6 March 2018 (a replying affidavit was filed on 15 February 2018).

11. The Court took arguments from the parties as scheduled on 6 March 2018 and reserved ruling to today. It has considered all the material placed before it.

12. The legal principles governing an application seeking injunctive orders such as is under consideration are now so trite that this Court will not endeavour to reinvent the wheel. The Court will keep the principles in mind.

13. An examination of the real dispute between the parties both in this application the subject of this ruling and the substantive Cause is whether the demotion and surcharge of the applicant was fair (sound in both law and contract).

14. The decision to demote and surcharge became effective on 15 November 2017 though the applicant was informed on 5 December 2017, and therefore in the view of the Court, the proposed order 3 has been overtaken by events.

15. The applicant must have been alive to that fact and that is why in proposed order 4 he sought an order reinstating him to the position of Treasury Manager.

Prima facie case

16. The applicant contended that demotion was not one of the *penalties or sanctions* contemplated by section L. 8 of the Human Resources Policy Manual 2013 which governed the relations between him and the Respondent.

17. He also maintained that the position that he had been demoted to was non-existent in the Respondent's structure.

18. The Respondent on the other hand asserted that section L.7 (3)(iii) of the Manual empowered the Board to give a lesser penalty than dismissal where it found an employee was in breach of discipline.

19. The Respondent did not respond to the applicant's arguments that its organisational structure did not have the position of *Assistant Treasury Manager*.

20. Demotion is not expressly provided for in the Respondent's Manual as a sanction or penalty in disciplinary cases.

21. Considering that demotion is not expressly listed among the sanctions available and that there was no denial that the position of *Assistant Treasury Manager* did not exist in the organisational structure of the Respondent, the question whether *demotion* was a valid sanction is at large, and on this score the Court finds that the applicant established a prima facie case.

Irreparable loss

22. The applicant urged that the demotion had led to reduction of salary and allowances which he had been earning, and therefore he would be occasioned irreparable loss.

23. Considering that the applicant is still serving the Respondent, and that the loss in terms of salary and allowances would be easily quantifiable were the Court to find that the action of the Respondent was unfair (not grounded on contract and the law), after a hearing on the merits, the Court would be able to make an appropriate order restoring the applicant to his position with any accrued arrears.

24. The applicant therefore did not satisfy this limb of the applicable principles.

Balance of convenience

25. Proposed Order 6 was so generously worded that were the Court to allow it, the Respondent's prerogative as an employer even when the applicant is accused of other disciplinary offences would be hamstrung.

26. The balance of convenience does not tilt in favour of the applicant.

Conclusion and Orders

27. From an evaluation of the material placed before Court, the applicant has not met the test for grant of the orders sought.

28. However, the applicant has raised serious questions as to the validity and fairness of the sanctions/penalties which were meted on him and in order to preserve and balance the rights of the parties, the Court directs that

- (a) The Respondent not to recruit or employ a substantive Treasury Manager pending the hearing and determination of the Cause on a priority basis.
- (b) The Respondent to file and serve its Response, witness statements and documents to be relied on before 4 May 2018.
- (c) Claimant to send proposed Issues to the Respondent before 11 May 2018 for amendment or agreement as necessary.
- (d) If Issues are not agreed/settled by 18 May 2018, Claimant to file its proposed Issues for trial by 23 May 2018.
- (e) Convenient hearing date to be scheduled hereinafter.

29. Costs in the cause.

Delivered, dated and signed in Nairobi on this 20th day of April 2018.

Radido Stephen

Judge

Appearances

For applicant Mr. Odhiambo instructed by Nchogu, Omwanza & Nyasimi Advocates

For Respondent Mr. Agwara instructed by Albert Mumma & Co. Advocates

Court Assistant Lindsey