



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1437 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 17th May, 2018)

DOMINIC CHUNGANI MUTESHI.....CLAIMANT

VERSUS

SACCO SOCIETIES REGULATORY AUTHORITY BOARD...RESPONDEDNT

RULING

1. The Application before Court is the one dated 22.7.2016. The Application was filed through a Notice of Motion filed by the firm of Nchogu, Omwanza & Nyamisi Advocates. The Motion was filed under Rule 27(1) (c) (b) of the Industrial Court Rules, 2010, Section 1A, 1B, 3A & 63 (e) of the Civil Procedure Act and all other enabling provisions of law.

2. The Applicant sought orders as follows:-

1. That this application be and is hereby certified urgent and service is dispensed with in the first instance.
2. That pending the hearing interpartes and determination of this application the Respondent, its members, employees and/or agents be and is hereby restrained from anyway carrying out a recruitment exercise for the position of Chief Manager – Human Resource and Administration which is the subject of the proceedings.
3. That pending the hearing interpartes and determination of the Cause/Suit herein the Respondent, its members, employees and/or agents be and is hereby ordered to allow the Applicant continue working under the same contractual terms as the Chief Manager – Human Resource and Administration.
4. Any other order and or relief the reasonable Court may grant in the circumstances.
5. THAT cost of this application be awarded to the Claimant/applicant.

3. The Application was also supported by the affidavit of Dominic Chungani Muteshi, the Applicant/claimant herein and grounded by the following grounds:-

- a. *The Claimant/Applicant was employed by the Respondent on 1st July 2010 as Chief Manager Human Resource and Administration.*
- b. *The Applicant diligently and faithfully executed duties assigned until on 10th August 2015 when he was accused of inciting the Respondent's staff and threatened by one, John Mwaka, the Respondent's acting Chief Executive Officer, that he (the Applicant) would be dealt with.*
- c. On 11th May 2015, the Respondent received an anonymous letter which raised a couple of issues, namely:-
 - i. **Corruption** whereby the then SASRA's CEO, Mr. Ademba was accused of influencing procurements and awarding tenders to his friends.
 - ii. **Tribalism** in hiring and promotion of staff allegedly presided over by the CEO.

iii. Numerous and expensive foreign trips by the CEO and his cronies.

d. Based on the letter an audit was conducted by National Treasury where the Claimant was, according to the Respondent, accused of unprocedural promotion of staff and recruitment of 23 officers contrary to Code of Conduct and Human Resources and Administration Policy Manual, 2012.

e. On 9th December 2015, the Respondent issued to the Claimant a notice to show cause why disciplinary action should not be taken against him for the misconduct described in paragraph (d) above. The applicant was not provided with the report by National Treasury.

f. On 10th December 2010, the Applicant responded to the show cause letter where he brought to the attention of the Respondent his ignorance of the contents of the report by the National Treasury. The Applicant also discussed the provisions of Sacco Society Regulatory Authority (SASRA) Human Resource and Administration Policy Manual 2012 particularly Section C 2(1) and 3.4 which vests staffing powers on the Respondent.

g. According to Sacco Society Regulatory Authority (SASRA) Human Resource and Administration Policy Manual, 2012, the role of the Applicant was to facilitate the recruitment and not to veto decisions by the Respondent itself or through the CEO upon delegation of powers.

h. The persons the Applicant was accused to have arbitrarily hired were actually issued with appointing letters by the then CEO Mr. Carilus Ademba in his capacity as appointing authority. Other appointments and promotions were done at board level by the Respondent.

i. On 9th December 2015 the Applicant received yet another show cause letter accusing him of insubordination for filing complaint with third parties and not the Applicant's supervisor.

j. On 10th December 2015 the Applicant responded to the second show cause letter where he gave his side of the story.

k. Despite giving a proper explanations on both charges, the Applicant was on asked by the Respondent, via a letter dated 4th December 2015, to go on compulsory leave pending investigations.

l. On 27th April 2016, the Respondent wrote to the Applicant inviting the Applicant to attend a disciplinary hearing on 5th May 2016.

m. On 29th April 2016 the Applicant wrote to the Respondent protesting the notice period and questioning legitimacy of the proceedings considering the fact that the 90 days period within which the hearing ought to have been done after the suspension had lapsed.

n. In spite of the protest by Applicant of allegation of his rights, the Respondent proceeded to disciplinary hearing.

o. The Applicant gave a comprehensive and accurate submission as his defence where he articulately explained his case.

p. In his submissions to the Respondent, the Applicant succinctly explained tribalism and favoritism in recruitment and promotion which were perpetuated by the former CEO. He also explained the role he played in hiring of staff which were in accordance with the Sacco Society Regulatory Authority (SASRA) Human Resource and Administration Policy Manual, 2012.

q. Through a letter dated 19th May 2016, the employment contract of the Applicant was terminated.

r. The termination was done by the Respondent's Chief Executive Officer. The Respondent as a Board did not approve the termination as required by law.

s. The Respondent did not consider the Applicant's case as no proper reason was given for the decision.

t. The Applicant appealed against the termination decision but the appeal was not heard as no person or body granted the Applicant audience.

u. The audit report by the National Treasury which allegedly initiated the termination process blamed the weak governance of SASRA on the failure by the Executive and the Board to adhere to internal controls and laid down Regulations and Procedures.

v. The Respondent's CEO ignored the findings of the National Treasury and proceeded to terminate the Applicant's services.

w. The conduct of the Respondent's CEO was unfair and in breach of the provisions of the Constitution and Employment Act, 2007.

x. The Respondent has initiated recruitment process to fill the vacancy purportedly left by the Applicant.

y. **The Applicant has instituted a suit against the Respondent challenging the termination and asking for reinstatement.**

z. **There is imminent danger that the Respondent will permanently restrict the Applicant's right to fair hearing if the court does not restrain it from continuing with the recruitment.**

aa. **No prejudice will be occasioned on the Respondent.**

bb. **It is in the interest of justice to allow this application.**

4. In the supporting affidavit, the Applicant reiterated the averments made in the grounds above but annexed supporting documents of the events leading to his termination.

5. The Respondents opposed this application through a Replying Affidavit dated 17.8.2016 sworn by John Mutua Mwaka denying the Applicant's claim stating that there was a valid reason for the termination of the Applicant and that due process was followed.

6. The Respondent averred that the Applicant breached terms of his engagement including unprocedural hiring and promotion of staff, insubordination, disclosure of official information that he acquired in the performance of his duties and negligence in the performance of his duties as Head of Human Resource and Administration.

7. The Applicant filed a further affidavit where he reiterated his averments in the supporting affidavit. He averred that the hiring of the Respondent's staff was done by the acting Chief Executive Officer and approved by the board and he never had powers to veto decisions made by the Respondent who are his seniors.

8. I have considered the averments of both parties and the submissions filed. The only issue for determination by this Court is whether the Applicant herein has established a prima facie case with a probability of success. The Applicant seeks injunctive orders against the Respondent not to hire a replacement for his former office.

9. The Applicant should therefore establish his case as per the principle in **Giella vs Cassman Brown**. The principles enunciated in this celebrated case are 3 fold as follows:- **"thereof the Applicant must show a prima facie case with a probability of success. Secondly, an Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide the case on a balance of convenience"**.

10. Thus in this case, the Applicant needs to demonstrate the prima facie case. The Applicant has averred that he was dismissed unfairly and unprocedurally and therefore needs his position safeguarded.

11. The Respondents on the other hand insist that the termination of the Applicant was procedural. To demonstrate whether the dismissal is procedural or not, evidence will need to be led by the parties before this Court. This is not an issue to be decided at this preliminary stage.

12. The on the issue of whether if not granted this order the Applicant will suffer irreparable damage not compensatable in damages, it is my position that the Applicant can be compensated in damages if the Respondent is found to have acted unfairly and unjustly against him.

13. The only way to determine this application then is to consider it on a balance of convenience. I note that the Respondent is a statutory body with oversight functions in the management of Sacco Societies. It has been without a Human Resource & Administration Manager since the Claimant was terminated early 2016. On a balance of convenience, it would be more convenient to have the orders sought not granted them to be granted which works to the detriment of the Respondent.

14. In the circumstances, I decline to grant orders sought and dismiss this application accordingly.

15. Costs in the cause.

Dated and delivered in open Court this 18th day of May, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Njagi holding brief for Momanyi for Claimant – Present

Respondents – Absent