



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 708 OF 2018**

MONICA MELLAN ACHODE.....1<sup>ST</sup> CLAIMANT

CORNELIUS W. LUPAO.....2<sup>ND</sup> CLAIMANT

**VERSUS**

THE NATIONAL COUNCIL FOR LAW REPORTING.....1<sup>ST</sup> RESPONDENT

THE STATE CORPORATIONS ADVISORY COMMITTEE.....2<sup>ND</sup> RESPONDENT

**RULING**

**Introduction**

1. The application before me is the Claimants' Notice of Motion dated 14.5.2018 brought by the claimants. It seeks the following orders:

(1) THAT this Honourable Court be pleased to certify this application as urgent and dispense with the service at the first instance.

(2) THAT this Honourable Court be pleased to grant an ex-parte interim injunction restraining the 1st Respondent either by itself, servant and/or agents or any person acting on its direction or authority from proceeding to fill in the position of Deputy Chief Executive Officer of the Respondent, executing a letter of appointment with any person or appointing any other person to replace the 1st Applicant, or allowing the said person to report to work at any time subsequent to such recruitment or fill in process; with the 2nd Respondent being restrained from approving any such appointment, filling or recruitment pending the hearing and determination of this application *inter partes*.

(3) THAT this Honourable Court be pleased to grant injunction restraining the 1st Respondent either by itself, servant and/or agents or any other person acting on its direction or authority from proceeding to fill in the position of Deputy Chief Executive Officer of the Respondent, executing a letter of appointment with any person or appointing any other person to replace the 1st Applicant, or allowing the said person to report to work at any time subsequent to such recruitment or fill in process; with the 2nd Respondent being restrained from approving any such any appointment or recruitment pending the hearing and determination of the claim herein.

(4) THAT costs of this application be provided for.

2. The application is opposed by the first Respondent through the Replying Affidavits sworn by M/s Jannet Lunyolo Watiha and Mr. Longe't Terer. The replying affidavits are not dated but they were both filed in Court on 28.5.2018. The gist of the respondent's case is that the application is overtaken by events because the new Deputy CEO has already been appointed after a lawful process.

3. When the application came up before the Duty Judge on 14.5.2018 under certificate of urgency, prayer 2 of the Motion were granted pending the inter partes hearing on 28.5.2018. However, on the 28.5.2018, the hearing never took place due to late filing of the Replying Affidavit and the Court fixed the same for hearing on 31.5.2018 and granted leave to the applicants to file further affidavit in support of the application.

### **Applicant's Case**

4. Mr. Ogembo learned counsel prosecuted the application on behalf of the claimants. He relied on the 3 affidavits sworn by the claimant's to argue the application. He prayed for prayer 3 of application which basically injunction to restrain the person recruited as the Deputy CEO of the respondent from reporting and taking up the position pending the hearing and determination of the suit. The counsel argued that the process by which they recruited was not in accordance with the law. He relied on the letter by the second respondent dated 11.1.2018 and 16.2.2018 which referred to the circulars issued earlier and barred the first respondent from advertising and filling of the vacancy of Deputy CEO until new HR policy was approved by her.

5. The counsel further argued that the first respondent failed to prepare new HR policy as directed in line with the guidelines given by the Public Service Commission in 2016 and instead submitted the first respondent submitted her 2011 drafts which were rejected as being out of time with the 2016 PSC Guidelines. In response, the first respondent said that she was not bound by the second respondent's directions and proceeded to recruit a Deputy CEO.

6. Mr. Ogembo submitted that section 27 of the State Corporations Act grants the second Respondent exclusive power, to oversight the operations of all the State Corporations including the first respondent.

He further submitted that by the Delegation instrument dated 9.12.2015, the PSC delegated its functions under Article 232 of the Constitution to the second respondent in relation to matters concerning State Corporations. In the counsel's view, the circular by the National Treasury about freezing of employment is not relevant to this case because it does not override the powers of the second Respondent in relation to HR matters of terms and conditions of service in State Corporation. He argued that the first respondent breached the law by recruiting a Deputy CEO before approval of her HR policy as directed by the second Respondent and as a result, the first claimant who was acting as Deputy CEO was affected.

### **First Respondent's Case**

7. Mr. Muthuri, learned counsel for the first Respondent opposed the application and relied on the affidavits sworn by Mr. Long'et Terer and Jannet Lunyolo Watila aforesaid. He submitted that the impugned recruitment has been completed and a suitable candidate duly appointed to report on 16.7.2018. He further submitted that the interim order given ex parte were given in material non-disclosure and the Judge was conflicted.

8. The counsel further urged that the second applicant lacks standing to sue because there is no relief available to him herein nor can he swear affidavit on behalf of the first applicant. As regards and section 27 of the State Corporation Act, the counsel admitted the oversight powers of the second respondent but submitted that whereas but the committee is allowed to advise State Corporations on the appointment removal and transfers that is done only "where necessary." In his view, such advice is neither mandatory nor binding on the first respondent. He contended that section 9(4) of the National Council for Law Reporting bestows upon the first respondent's council, the sole mandate of appointing Assistant Editor (Deputy CEO) upon the terms to be determined by the council.

9. The counsel admitted that the filling of the vacancy of the Deputy CEO was discussed at the Council meeting where the second applicant was present as the secretary and raised an objection but it was said that circular No. 20 of 2015 – to all the Cabinet Secretaries and Accounting Officers issued by the National Treasury on 4.11.2015 froze all employment except for replacement of vacant posts for professional and Technical stations like in this case. He further urged that on 19.3.2018 the first Respondent wrote to the Head of Public Service to verify whether it was okay to fill the post of the Deputy CEO after it was left vacant by the promotion of the current CEO and THE Head of the Public Service confirmed that the filling of the said vacancy was okay because it fell within the exemptions to the freezing circular No. 20 of 2015. He therefore prayed for the application to be dismissed because the orders sought have been overtaken by events.

### **Second Respondent's Case**

10. Miss Mbilo learned state counsel appeared for the second respondent but raised only legal arguments because she had filed no Replying Affidavit. She urged that the suit raises the issue of legality of the recruitment process which requires taking evidence at the trial before any orders can be issued. She pointed out that the second respondent lacks capacity of being sued because it is not established as a body corporate under section 6 of the State Corporations Act. She also urged that naming of the second respondent to the suit is a misjoinder because there is no employment relationship between her and the applicants. In her view the joinder would have been in order had the suit been instituted as a Constitutional Reference or Judicial Review Application.

### **Applicants' Rejoinder**

11. Mr. Ogembo submitted that the interim orders herein were made by Wasilwa J when the file was presented to her under certificate of urgency as the Duty Judge and there was occasion for her to recuse herself. In addition, he submitted that section 46 of the Employment Act allows continuing employees, like the applicant's herein, to sue their employer.

He also urged that based on section 27 of the State Corporations Act and the instruments exhibited by the applicants in their affidavits herein, the power to recruit employees for the first respondent is not the sole mandate bestowed on her. He concluded by contending that the National Treasury functions are different from the HR functions of the second Respondent and her circulars cannot override the functions of the second respondent and that is confirmed by paragraph 20 of the National Treasury's Circular Number 13 of 2017 dated 7.12.2017 notifies the State Corporations to comply with the second Respondent's Circular No. OP/SCAC.9/21/121 dated 15.5.2017 on HR Policy instruments while preparing Budget for the financial year 2018/2019 and medium-term projections for the years 2019/2020 and 2020/2021.

### **Analysis and Determination**

12. There is no dispute that the first respondent has recruited a person to fill the vacant post of Deputy CEO and the person will report to work on 16.7.2018. There is also no dispute that the recruitment process was done despite objection by the second applicant and the second respondent. The issue for determination is whether the applicants have met the threshold for the grant of interlocutory injunction.

13. The threshold for the grant of interlocutory injunction were set out by *Giella Vs Caseman Brown & co. Ltd [1973]EA 358* where the Court held that the applicant must:

- (a) establish a prima facie case with probability of success
- (b) demonstrate that if the order is denied, the applicant will suffer irreparable harm.
- (c) if the Court is in doubt, to decide the case on a balance of convenience.

### **Prima facie case**

14. In this case, the applicants here argued that the first respondent has, contrary to the law and express directive from the second respondent recruited a new person to the post of the Deputy CEO. In addition the applicants have contended that the whole recruitment process was done contrary to the law and was shrouded in mystery because the first applicant was not even shortlisted after applying, despite having acted in that position since 6.10.2015. They have further contended that, as a result of the foregoing matters, the first applicant had the reasonable expectation of being appointed as the substantive DCEO was denied that opportunity despite having the necessary qualifications and experience. In view of the foregoing reasons, the applicants have submitted they have made out a prima facie case capable of succeeding at the trial.

15. However, the first respondent is of a contrary view. According to her the process of recruiting a new Deputy CEO was done within the law namely section 5(3) of the State Corporations Act and section 9(4) of the National Council for Law Reporting Act. She further urged that the recruitment was open and competitive through advertisement on 22.8.2017 and 17.10.2017 and the first applicant who was acting in the position applied but she did not meet the minimum threshold for shortlisting and the eventual appointment set out in the advertisement.

16. I have carefully considered the submissions counsel for both sides. At the heart of this dispute is the role of the second respondent and the National Treasury in the first respondent's operations and the HR management. I believe from a constitutional standpoint that, the role of the latter is limited to budgeting and funding while the role of the former is purely HR management and Administration. The two roles are very crucial and complement each other because recruitment in the public service depends on existence of vacancy, funds and government policy. All these factors must converge before any person is recruited into the public Agency. The public agency must prove that a vacancy has arisen in its establishment, the Treasury has allocated funds for the same and that the recruitment is in accordance with the government policy.

17. In this case the applicants have exhibited a Delegation Instrument signed between the PSC and the second respondent by which, pursuant to Article 234 (5) of the constitution, the former delegated her constitutional functions under Article 234 (2) (b), (c), (d), (e), (f) and (g) of the constitution to the latter with respect to state corporations. The said functions include disciplinary control over and removal of persons holding or acting in offices in the public service; promotion of values and principles provided in article 10 and 232 of the constitution; investigation, monitoring and evaluation of the organization, administration and personnel practices of State corporations; ensuring that state corporations are efficient and effective; developing HR in the public service; and reviewing and making recommendations in respect of conditions of service, code of conduct and qualifications of officers in state corporations. The Delegation Instrument is cautiously couched such that the second respondent is doing the functions on behalf of, and subject to the PSC's power to exercise any of the delegated powers.

18. Pursuant to the said delegated functions and the powers donated by section 27 of the State Corporations Act, the second respondent issued circular No. Op/SCAC.9/21/R1 on 15.5.2017 to State Corporation CEOs notifying them of the HR Policy Guidelines issued by the PSC in May 2016 and requiring them to align their respective HR instruments with the PSC's Guidelines and submit to her by 31.8.2017 for approval. The correspondents exhibited by the applicants confirm that the first respondent never complied with the circular but on 22.8.2017 she advertised the vacancy of Deputy CEO in Dailies and repeated the same on 17.10.2017, the same date she decided to comply with the second respondent's circular dated 15.5.2017 by she submitting her HR instruments developed in 2011. However the said draft HR instrument was rejected because its provisions were inconsistent with the PSC's 2016 Guidelines, and the first respondent was directed to comply with the circular dated 15.5.2017 but she never did so.

19. On 11.12.2017, the first respondent wrote to the second respondent requesting for approval to recruit additional employees but the latter declined vide letter dated 11.1.2018 on ground that she had not complied with the circular dated 15.5.2017 in relation to submission of HR instruments for approval. In addition the letter barred her from advertising or filling any vacant post until the HR instruments are duly approved in soonest possible date but not later than 28.2.2018. The first respondent wrote back on 23.1.2018 but the second respondent on 16.2.2018 reiterating the directive given by her letter dated

11.2.2018 and reminding her that she was in default of a statutory obligation by failing to comply with the circular dated 15.5.2017.

20. Determined to continue with the recruitment exercise against the advice from the second respondent, the first respondent allegedly conducted interviews for the said vacancy on 23.2.2018 and wrote to the Chief of Staff of the president & Head of the Public Service on 19.3.2018, asking for his interpretation of the Circular No. 20/2015 dated 4.11.2015 by the National Treasury, which froze employment. She specifically asked for his concurrence that the circular had permitted replacements for the positions which were already established and give his approval for recruitment of her Deputy CEO, which was already established, and had been sufficiently funded through budgetary allocation by the National Treasury.

21. Even before receiving any word from the Head of Public Service, and against the objection by the second applicant, the first respondent proceeded to issue an Offer of Appointment to Ms. Janet Mbithe Munywoki vide the letter dated 3.5.2018. The offeree accepted the offer of appointment by her letter dated 7.5.2018, the same date when the first respondent's letter dated 19.3.2018 to the Head of the public Service, was responded to and approval granted by the Secretary, State Corporations Oversight, one Wanjiku Wagoki, acting for the Head of Public Service.

22. In view of the foregoing approval, the first respondent believes that the recruitment process is lawful, procedural and duly finalized. However the applicants are of a contrary view because in their view the approval given by the secretary of State Corporations Oversight is invalid and cannot override the directives and circulars given by the second respondent in exercise of functions as donated by section 27 of the State Corporations Act and Article 234 of the constitution read with the delegation Instrument executed by the PSC under Article 234 (5) of the said constitution.

23. I have carefully considered the submissions by the two sides and all the exhibits annexed to their rival affidavits. It appears that the Secretary of State Corporation Oversight is a position in the Office of the President working under the office of the Head of the Public Service which is established in the Public Service. The court presumes the legality of that arrangement and the correspondences from that office until proved otherwise.

24. Flowing from the foregoing, I would not hesitate to find that in case of any conflict in correspondences from the second respondent and the Secretary State Corporation Oversight in the office of the Head of the Public Service, the latter should take precedence. Consequently, I disagree with the applicants' contention that the letter dated 7.5.2018 signed by Wanjiku Wagoki, Secretary of the State Corporations Oversight on behalf of the Head of Public service is of no consequence. The said letter, in my view, is not written by the State Corporation Oversight, but by Wanjiku Wagoki whose job titles is Secretary for State Corporation Oversight and she did so on behalf of the Head of the Public Service.

25. The said letter in my view was well founded in the Circular No.20/2015 because it was clarified that the filling of vacancies through replacement was exempted from the freeze on employment. The circular stated as follows in relation to recruitment:

***“The government is experiencing a bloated workforce in some cadres.... The Cabinet recently directed a freeze of recruitment (except for security agencies, health workers, and education sector), pay adjustments, and upgrading.... The freeze of employment does not, however, include replacement of vacant posts for the professional and technical staff.”***

26. There is no dispute that the vacancy in issue herein concerns a professional. The qualifications for appointment published in the first respondent's website, copy of which was exhibited by the applicants as annexure MMA3, were as follows:

***“xi. A Master's degree in Law or its equivalent;***

***xii. Admission to the roll of the Advocates of the High court of Kenya;***

**xiii. At least nine (9) years of post- admission working experience- 7 of which should have been in a supervisory position;**

**xiv. At least one management course lasting for not less than three (3) weeks;**

**xv. Contemporary computer and ICT skills;”**

27. With the approval from the Head of the Public Service to recruit, and the budgetary allocation from the National Treasury, the First Respondent had all the legal right to fill the existing vacancy in the position of Deputy CEO which was caused by the promotion of the former Deputy CEO. There is no dispute that the first respondent has the sole mandate under section 9(4) of the NCLR Act to appoint the Assistant Editor/Deputy CEO and Reporters upon such terms and conditions as the council may determine but which, of course, under the new constitutional dispensation, must lie within the limits of reasonableness approved by the second respondent on behalf of the PSC on the one hand, and the salaries and Remuneration Commission (SRC) on the other hand.

28. As regards the procedure followed in the recruitment, it is common knowledge that on 22.8.2017 and 17.10.2017, the first respondent advertised the vacancy in the position of Deputy CEO in the Newspapers and the first applicant applied for the same. Thereafter qualified candidates were shortlisted and interviews conducted on 23.2.2018 leading to the appointment of Janet Mbithe Munywoki as the new Deputy CEO of the first respondent. The second applicant, who is the first respondent's secretary, has admitted that the recruitment was discussed by the first respondent's board and has not denied that interviews were conducted on 23.2.2018 as alleged by the respondent in the letter of Offer of Appointment dated 3.5.2018. According to the first respondent, the first applicant failed the minimum requirements for shortlisting and eventual appointment.

29. However the applicant has maintained that she held the required qualifications and experience having acted in that office since 6.10.2015, and contended that the whole process was shrouded with mystery. She has however not exhibited any of her credentials to fortify her allegations that she met the minimum academic and professional qualifications. She has also not produced any documentary evidence or demonstrated any legal basis upon which to lay her alleged reasonable expectation of being appointed the substantive Deputy CEO of the respondent. In my view, she reaped beyond her reasonable expectation by acting in the said office for over two years. In most of the HR instruments I have seen in the Public Service, including the draft HR policies and Procedures manual 2016 for first respondent exhibited as annexure JLW-7, the period for acting in an office is 6 months with no guarantee of confirmation to the post. Consequently, I find that the 1st applicant has not proved on a balance of probability that she met the minimum requirements for the shortlisting and eventual appointment to the advertised vacancy. I also find that the applicants have fallen short of proving that the procedure followed in the recruitment to fill the vacancy of the Deputy CEO of the first respondent was in breach of the law and shrouded with mystery.

30. It now clear from my analysis above that, on the basis of the material presented to the court as at this stage, and I must hold that, the impugned recruitment of the new Deputy CEO of the first respondent was substantively and procedurally done accordance with the provisions and the principles enacted in the constitution of Kenya and the relevant statutes. Flowing from the foregoing it is therefore in order to further find that, the applicants have not proved a *prima facie* case with probability of success. A *prima facie* case was defined in *Mrao Limited vs First American bank of Kenya & 2 others [2003]eKLR* as follows:

**“A *prima facie* case in civil application includes but it is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

**Conclusion and disposition**

31. In view of the fact that the applicants have failed to prove a prima facie case with probability of success, there is no obligation for the court to determine the other two elements precedent to granting interlocutory injunction, that is to say, irreparable harm and the balance of convenience. In any event the said elements were not pressed by the applicants' in his submissions. Having considered the pleadings, the motion, rival affidavits and the oral submissions presented, I withhold the orders sought and proceed to dismiss the applicants' notice of Motion dated 14.5.2018 with no order as to costs.

32. As a parting shot, however, I wish state that the Janet Mbithe Munywoki should be enjoined to this suit. In my view, the newly appointed Deputy CEO of the first respondent, is a necessary party to these proceedings because she is likely to be affected by the outcome. Consequently I direct that the she be enjoined as a defendant in this suit forthwith to avoid the risk of condemning her unheard.

**Dated, Signed and Delivered at Nairobi this 19th day of June, 2018**

**ONESMUS N. MAKAU**

**JUDGE**