



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 523 OF 2018**

**JOHN NYAMBU MALOMBE.....CLAIMANT**

**VERSUS**

**KENYA FILM CLASSIFICATION BOARD.....RESPONDENT**

**RULING**

**Introduction**

1. The application before me is the Claimant's Notice of Motion dated 11.4.2018 and it seeks the following orders:

- 1) **THAT** this Application be certified urgent and be heard ex parte in the first instance
- 2) **THAT** pending the hearing and determination of this application, this Honourable Court be pleased to issue conservatory orders maintaining the status quo and suspending the contents of the internal memo dated 28th December, 2017 issued by the Respondent's Chief Executive Officer,
- 3) **THAT** pending the hearing and determination of this application, this Honourable Court be pleased to issue conservatory orders maintaining the status quo and suspending the Respondent's board resolution purportedly passed on 31st January 2018 and the contents of the letter dated **22nd March 2018** Ref. No. **KFCB/2000604448(45)**.
- 4) **THAT** pending the hearing and determination of this application, this Honourable Court be pleased to issue conservatory orders maintaining the status quo and stopping the Respondent from headhunting, advertising, recruiting, shortlisting, interviewing and/or employing any Human Resources and Administration Manager in place of the Claimant.
- 5) **THAT** pending the hearing and determination of this case, this Honourable Court be pleased to issue conservatory orders maintaining the status quo and suspending the contents of the internal memo dated 28th December, 2017 issued by the Respondent's Chief Executive Officer.
- 6) **THAT** pending the hearing and determination of this cause, this Honourable Court be pleased to issue conservatory orders maintaining the status quo and suspending the Respondent's board resolution purportedly passed on 31st January 2018 and the contents of the letter dated **22nd March 2018** Ref. No. **KFCB/20006040448(45)**.
- 7) **THAT** pending the hearing and determination of this cause, this Honourable Court be pleased to issue conservatory orders maintaining the status quo and stopping the Respondent from headhunting, advertising, recruiting, shortlisting, interviewing and/or employing any Human Resources and Administration Manager in place of the Claimant.
- 8) **THAT** the costs of this Application be provided for.

2. The motion is supported by the claimant's own affidavit sworn on 11.4.2018. The application is premised on several grounds as set out in the body of the motion and the supporting affidavit. In brief the claimant states that on 28.12.2017 the redeployed him back to the public service Commission (PSC) where he had been head hunted from but when the PSC rejected the respondent redeployment on ground that the claimant's services and benefits had long been transferred to her, the respondent unfairly and unilaterally demoted him from HR and Administration manager to Senior HR officer, the position he held while under the PSC 6 years earlier. In addition, the CEO refused to assign any duties to the claimant and on 6.3.2018 proceeded to advertise vacancy in the post of HR and Administration Manager. It is the applicant's case that the actions by the respondents was unfair and unlawful and amounts to violation to the principles of fair labour practices. He maintained that his rights as an employee and public officer under Article 41, 47 and 236 were violated and unless the orders

sought is granted the suit will be rendered nugatory

3. The application is opposed by the respondent through the Replying Affidavit sworn by the respondent's CEO, Mr. Ezekiel Mutua on 25.4.2018. The gist of the affidavit is that on 24.8.2012 the claimant was deployed from PSC while serving in the position of Human Resource Management Officer but on 6.11.2012 he was promoted by the Ministry he came from to the position of Senior Human Resource Management Officer (Job Group 'L'). It is the respondent's case that the claimant has never held the substantive post of HR and Administration Manager but was only appointed in an acting capacity pending recruitment of the substantive office holder. It is further respondent's case that the stopping of the claimant from acting in the post of HR and Administration Manager and advertising vacancy on that position was lawful, procedural and fair. Finally, it is the respondents case that the application is brought without disclosing of all material facts and it should be dismissed.

4. The Application was disposed of by written submissions. The Applicant filed on 7.5.2018 and the respondent filed on 17.5.2018.

### **Applicant's Case**

5. The applicant stated that in 2009, he was deployed from the Ministry of Information and Communication where he was working to head the Human Resource functions at the respondents. On 11.12.2014 he was absorbed by the respondent as the HR and Administration Manager under a transfer of service agreement. He further stated that from 28.12.2017 he was subjected to unjustified and arbitrary action which amounted to violation of the principles of fair labour practice. He contended that by letters dated 31.1.2018 and 23.3.2018 the respondent purported to demote him from HR and Administrative Manager to Senior human Resources Officer, which action was unlawfully, unprocedurally and unilaterally done a contrary to section 10(5) of the Employment Act and Article 41 of the Constitution. He contended that he was condemned unheard contrary to Article 47 and 236(b) of the constitution and the respondent advertised the post of HR and Administration Manager on 6.3.2018. He therefore urged that unless the order sought is granted the post will be taken and his suit will become nugatory.

6. The Claimant deposed that he did his work diligently as the head of HR functions and led the respondent to ISO.9001:2008 certification. On 22.12.2017 he was given leave by the CEO starting 27.12.2017, which was the first leave in 4 years time, but he was not let to enjoy it. On 27.12.2017 at 7.58 a.m., he received SMS text from the CEO enquiring about the Manager on duty. He responded that he had gone the one but he was on leave. The CEO demanded for a list of all the staff on duty while knowing that he was away on leave. However, the claimant spoke to a colleague Mr. Onesmus Muema who prepared the list and gave to the office of the CEO. The CEO responded by more SMS texts telling him that he should prepare to return to his former job at the public Service Commission.

7. On 28.12.2017, the CEO wrote a letter deploying him back to the PSC and another one to PSC notifying it of his redeployment. In his letter for redeployment the CEO asked him to hand over to Vincent Ayaya who was the Head of Accounts. On 8.1.2018 he reported to the Head of HR in the State Department of Arts and Culture but he was told to go back to his office at the respondent and on 16.1.2018 the Principal Secretary wrote to the respondent's CEO explaining that the claimant's pensionable services were already transferred to the respondent and therefore he could not revert to the Civil Service.

8. On 31.1.2018 the Board met and resolved that a new HR and Administration Manager be recruited and that the claimant should revert to his substantive position of the Senior HR Officer, the position he held in the Civil Service 6 years earlier. On 1.2.2018, he met the CEO for the first time after leave and he was told that he was in the office illegally and he should handover the duties as earlier directed. The CEO also told him that he will not assign him any duties and advised him to go for another leave. He was given 30 days more leave and while there, he saw an advertisement of the vacancy in the post of HR and Administration Manager at the respondent carried in a daily newspaper of 6.3.2018.

9. Upon return to work on 26.3.2018 the applicant appealed against that decision to demote him, and to advertise his job but the appeal was never responded to. Instead, on 28.3.2018 he received a letter notifying him of Board's decision made on 31.1.2018 by which his salary was reduced without prior notice. He further contended that he met the CEO again on 29.3.2018 and he was told that his appeal to the Board lacked merits and the outcome was already predetermined. He therefore wrote to CEO on 10.4.2018 informing him that he was no longer interested in pursuing his appeal.

10. The applicant concluded by contending that he was subjected to arbitrary treatment by the unilateral and unlawful demotion contrary to section 10(5) of the Employment Act, and Articles 41, 47 and 236(b) of the constitution. He relied on several judicial precedents to support his case.

### **Respondent's Case**

11. The respondent has admitted that the claimant was seconded to her while serving as HR Management and Development Officer (Job Group 'L') and later she was absorbed him in the same position but later he was appointed in acting capacity to the office of HR and Administration Manager in Job Group Q. The respondent contended that the applicant was never confirmed in the post and as such he remains in his substantive position in Job Group 'L'. She therefore accused the claimant for bringing the application and obtaining ex parte orders without making full disclosure of all the material facts.

12. The respondent further contended that the orders sought are not warranted because the applicant has not met the threshold for granting the same. She urged that the applicant has not proved a *prima facie* case with probability of success; that if the order is withheld, he will suffer a real danger which may be prejudicial to him; and that public interest lies in favour of granting such conservatory orders. She submitted that the order should not be granted because, the applicant cannot continue acting as the HR and Administration Manager forever against her express HR policies and procedure manual; that the applicant has not been demoted; that no disciplinary action is involved in the stopping the claimant from acting in the position of HR and Administration Manager; that the public interest in recruiting a substantive HR and Administration Manager far outweighs the applicants private interest; and that she is acting within the Public Service Act and Article 10 and 232 in filling the office of HR and Administration Manager through competitive recruitment. She therefore prayed for the setting aside

of the interim orders and dismissal of the application with costs. She also cited several judicial precedents to support her case.

### **Analysis and Determination**

13. There is no dispute that the applicant is employed by the respondent. The issues for determination is whether the applicant has met the threshold for granting 'conservatory orders' pending the hearing and determination of the suit herein.

14. The jurisprudence emerging from the Kenyan Courts is that for conservatory orders to issue, three elements must be proved. First, the applicant must establish a *prima facie* case with likelihood of success. Second, the applicant must demonstrate that if the order is withheld, there is a real danger that he or some section of the society will suffer prejudice as a result of a violation or threatened violation of the constitution. Third, public interest lies in favour of granting such conservatory orders. In **Michael Osundwa Sakwa Vs Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR**, Odunga J cited with approval the decision of Musinga J (as he then was) in **Centre for Rights Education and Awareness & 7 others Vs The A.G. H.C. Pet No. 16 of 2011** where it was held that:

***“At this stage a party seeking conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the conservatory order, he will suffer prejudice as a result of a violation or threatened violation of the constitution.”***

15. In **Judicial Service Commission Vs Speaker of the National Assembly & Another [2013] eKLR**, it was held that:

***“Conservatory Orders in my view are not ordinary civil law remedies provided for under the constitution, the supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”***

16. The foregoing position was acknowledged by the Supreme Court in **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others S. C. Application No. 5 of 2014** when it held that:

***“Conservatory orders bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders are therefore, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case, or high probability of success” in the applicant’s case for stay. Conservatory orders, consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.”***

17. In this case, the applicant has brought a normal claim alleging that he has been demoted from the position of Human Resources and Administration Manager contrary to section 10(5) of the Employment Act and Article 41 and 236(b) of the constitution of Kenya. The respondent has denied the alleged demotion and averred that the claimant was only stopped from acting in that position and reverted to his substantive position of Senior HR Management Officer. In as much as the applicant was a public officer within the meaning of Article 236 of the Constitution, I do not see, any, and he has not demonstrated the public interest in the Court granting the conservatory order sought. In my view, the suit before the court is purely private law dispute and it does not fall within the realm of the public law. The best remedy in my view is to seek in the circumstances of this case should have been interlocutory injunction in which case the requirement of proving public interest would not have been expected. Instead, the applicant would have, as he has attempted to do by his written submission, to prove the three essentials elements precedent before granting that relief as it was established in **Giela Vs Caseman Brown**. It is clear from the applicant’s supporting affidavit and the written submissions that the applicant is advancing a plea for an order for interlocutory injunction and not conservatory order which, according to the persuasive, as well as the binding precedents, cited above, is a public law remedy and public interest in the granting of the order must be demonstrate.

### **Conclusion and Disposition**

18. In view of the finding herein above that the applicant has not demonstrate the public interest in the Court granting the conservatory orders sought, I decline to exercise my discretion in his favour because it has not been properly invoked. Accordingly, will not waste time to venturing in the issue of *prima facie* case with likelihood of success, and the danger of suffering prejudice, because without linking the case with the issue of public interest, the applicant is excluded from the public law relief. In the upshot, I dismiss the application and set aside the interim conservatory order granted at the ex part stage. Costs shall be in the cause.

**Dated, Signed and Delivered at Nairobi this 14th day of June, 2018**

**ONESMUS N. MAKAU**

**JUDGE**