



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 365 OF 2018

LUCY KAWIRA MBUBA.....CLAIMANT

- VERSUS -

SURVO GENERAL WORKS LIMITED.....1ST RESPONDENT

MERY MUTHINI MBUBA.....2ND RESPONDENT

JOAN WANJA MBUBA.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Tuesday 31st July, 2018)

RULING

The claimant filed on 20.03.2018 an application by way of a notice of motion and through Kamau Kuria & Company Advocates. The application was under Order 40 Rules 1 and 3 of the Civil Procedure Rules, 2010, section 1A, 1B and 3A of the Civil Procedure Act, section 12 of the Employment and Labour Relations Court Act and Rule 16 of the Employment and Labour Relations Court Rules, 2011. The claimant made the following substantive prayers:

- 1) That the respondents be restrained by themselves, their servants and agents from engaging in acts of constructively and unlawfully dismissing the claimant from the office of Chief Executive Officer of the 1st respondent until the suit is heard and determined.
- 2) That the respondents be restrained by themselves, their servants and agents from interfering with the claimant's discharge of her duties under the contract of employment entered into by her with the 1st respondent on 01.09.2017 pending the hearing and determination of the suit.
- 3) That the respondents be restrained by themselves, their servants and agents from suspending the claimant or dismissing her pending the hearing and determination of the suit.
- 4) That the respondents be restrained from varying the terms of the claimant's contract of employment or terminating the same pending the hearing and determination of the suit.
- 5) That the respondents be restrained from advertising in the media or in any other manner the claimant's post of Chief Executive Officer of the 1st respondent pending the hearing and determination of the suit.
- 6) That cost of the application be provided for.

The application was supported by the affidavit by the claimant attaché to the application and her further supporting affidavit filed on 13.07.2018.

The respondents opposed the application by filing on 08.06.2018 the replying affidavit of Mercy Muthoni Mbuba, the 2nd respondent Chelanga Kihungi & Company Advocates.

The claimant's case is as follows:

- 1) The 1st respondent is the employer of the applicant as the Chief Executive.
- 2) The issues in dispute are partly subject of litigation in **Embu High Court Succession Cause No. 254 of 2006, In the matter of**

the estate of Eustace Mwoga Mbuba (Deceased) and Nairobi High Court Commercial and Admiralty Division Civil Case No. 130 of 2018, Lucy Mbuba Kawira –Versus- Mercy Muthoni Mbuba and Others.

3) In the succession cause, the 2nd and 3rd respondent sought to vary the claimant's terms of employment but the claimant successfully moved the Court to suspend the order. In civil case No. 130 of 2018 the claimant has sought redress because the 2nd and 3rd respondents have refused to separate the business of the 1st respondent which the claimant and her siblings have inherited from those which the 2nd respondent has inherited.

4) The dispute revolves around the 2nd respondent being the mother of the claimant supports the interests of half of the family which she is assisting and supports to take from the other half its inheritance from the claimant's late father's estate. Thus the family of 6 has been divided into two camps one led by the 2nd respondent including the claimant's sisters Joan Wanja, Judy Mwari and a brother Martin Munene and, the other by the claimant and her sister Dr. Caroline Kathomi Mbuba.

5) On 16.10.2017 the 2nd respondent owned only one share in the 1st respondent which she transferred to the children who inherited the other share owned by her late father. Thus the 2nd and 3rd respondent's cannot take decisions as directors of the 1st respondent as any such decisions are null and void. The 2nd claimant resigned as a director on 16.10.2017 by operation of law so that on 15.01.2018 her purported demotion of the claimant from the office of the 1st respondent's chief executive officer was null and void.

The respondent's case is as follows:

1) The children to the 2nd respondent and her deceased husband currently own 100% shares of the 1st respondent in equal shares of 20% each. The claimant's employer is the 1st respondent and she cannot sustain a claim against the 2nd and 3rd respondents.

2) Substantially similar issues have been raised in **Nairobi High Court Commercial and Admiralty Division Civil Case No. 130 of 2018, Lucy Mbuba Kawira –Versus- Mercy Muthoni Mbuba and Others.**

3) The 2nd and 3rd claimants are not pretending to be the directors of the 1st respondent.

4) On 01.09.2017 the 1st and 2nd respondents entered into a service contract with the claimant with a six months probationary period. The probationary period was ending on 28.02.2018. On 07.03.2018 the 1st respondent's board met and unanimously held that the claimant would not be confirmed in appointment because the probationary appointment was not satisfactory. At the same meeting it was agreed that the claimant would not be made a signatory to 1st respondent's accounts.

5) The 1st respondent is in the process of reorganising the business model with the consequence that the claimant's position will become redundant.

6) On 15.01.2018 the board for the 1st respondent proposed to demote the claimant to the position of Head of Department because as the chief executive officer, the 1st respondent's business was not running properly.

The 1st issue for determination is whether the Court should interfere in the 1st respondent's exercise of human resource powers over the claimant.

In such cases seeking to interfere with the employer's powers, the court follows its opinion in the ruling in **Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR** thus, "**The principles are clear.**

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

In the present case the claimant has not established the illegality or breach of the contract by the 1st respondent that would constitute a basis for the Court's intervention. Instead the claimant raises issues separate from the contract of service in issue and is questioning the validity of the 1st respondent's directors. It is not in dispute that such is a dispute subject of **Nairobi High Court Commercial and Admiralty Division Civil Case No. 130 of 2018, Lucy Mbuba Kawira –Versus- Mercy Muthoni Mbuba and Others.** If it is found in that case that the persons acting as directors of the 1st respondent were not entitled to do so, it is the view of the Court that the claimant will then find appropriate remedies as may be necessary such as reinstatement or damages as may become necessary. In any event, if the threatened restructuring of the 1st respondent's business goes on, the claimant will have the chance to pursue appropriate remedies as submitted for the respondents. Thus, the Court considers that the balance of convenience does not favour the granting of the remedies as prayed for as the 1st respondent as an employer may be required to hold back the restructuring in obedience of such orders and which will not balance the justice in the case.

In view of the findings, the court returns that the claimant has failed to establish a prima facie case as per **Giella-Versus- Cassman Brown (1973)EA 358**, and the balance of convenience does not favour granting the prayers as made. In any event, a monetary remedy as well as other remedies will be available to the claimant as may become necessary.

Considering all circumstances of the application, the same will be dismissed with costs in the cause.

In conclusion the application is hereby dismissed with costs in the cause.

Signed, dated and delivered in court at Nairobi this Tuesday 31st July, 2018.

BYRAM ONGAYA

JUDGE