



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 979 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 26th October, 2018)

THOMAS SKAMO LOLTIANYA..... CLAIMANT/APPLICANT

VS

AUTOMOBILE ASSOCIATION OF KENYA (Being Sued Through

JINARO KIPKEMOI KIBET -CHAIRMAN

DAVID K. WAWERU - TREASURER

ENG. ERASTUS K. MWONGERA – SECRETARY.....RESPONDENT

RULING

1. The Application before Court is the Notice of Motion Application dated 15/6/2018 filed by the Applicants herein under Certificate of Urgency and filed under Order 40 Rules 1 and 3 of the Civil Procedure Rules, 2010 and Section 1A, 1B and 3A of the Civil Procedure Act and Rule 17 of the ELRC (Procedure) Rules 2016 and seeking orders as follows:-

1. Spent

2. Spent

3. That this Honorable Court pleased to issue a mandatory injunction compelling the Respondent to reinstate the Claimant to the office of Chief Finance Officer.

4. That the Respondent be restrained by itself, its servants and or agents from interfering with the claimant's discharge of his duties as the Chief Finance Officer under the contract of employment entered into by him on 1st December, 2017, as varied on 1st February, 2018, until further orders of this Honorable Court.

5. That the Respondent be restrained by itself, its servants and or agents from interfering with the claimant's discharge of his duties as the Chief Finance Officer under the contract of employment entered into by him on 1st December, 2017, as varied on 1st February, 2018, pending the hearing and determination of this Cause.

6. That a permanent injunction do issue restraining the Respondent from filling the post of Chief Finance officer until further orders of this Honorable Court.

7. That a permanent injunction do issue restraining the Respondent from filling the post of Chief Finance officer pending the hearing and determination of this Cause.

8. That a permanent injunction do issue restraining the Respondent from advertising/ further advertising of the post of Chief Finance officer until further orders of this Honorable Court.

9. That a permanent injunction do issue restraining the Respondent from advertising/ further advertising of the post of Chief Finance officer pending the hearing and determination of this Cause.

10. That the Respondent be restrained from varying or terminating the Claimant's employment pending the hearing and determination of this suit.

11. That the costs of this application be provided for.

2. The Application is premised on the following grounds:-

a. "on 22nd May, 2018, the Respondent, through a letter illegally and fraudulently written by its Chief Executive Officer, purported to terminate the claimant's contract under which he served the Respondent as the Chief Finance Officer as from 1st February, 2018, on the false ground that the Respondent had not confirmed him to that office after he served a probationary period; the truth is that under his contract, the review of his performance for the purposes of confirmation was under Clause 18 of the Respondent's constitution, to be done by the Respondent's Governing Council; the Chief Executive Officer usurped that power; the Respondent purported to terminate the Claimant's former post of Deputy Finance Officer which was replaced by that of the Chief Finance Officer on 1st February, 2018; the said termination is illegal, null and void;

b. the said purported termination of the claimant's employment contravenes his right, under Article 41 of the Constitution to fair labour relations which include strict adherence to the contract of employment; it also contravened the procedural requirements of termination of a contract of employment under Section 41 of the Employment Act;

c. despite the fact that a 5 year contract from 1st December, 2017, as varied on 1st February, 2018, between the Claimant and the Respondent exists, the latter on 22nd May, 2018, purported to terminate the Claimant's employment illegally;

d. since 22nd May, 2018, the Respondent has set in motion acts designed to result in a constructive unlawful dismissal or unlawful termination of the claimant's contract of employment entered into on 1st December, 2017, as varied on 1st February, 2018; the acts of constructive termination are still continuing;

e. on 25th May, 2018, the Respondent embarked on a fraudulent and illegal recruitment of a person to replace the claimant as the Chief Finance Officer of the Respondent;

f. in the contemporary world, a contract of employment is viewed as a form of property and is protected by the constitution, legislation and the common law;

g. the purported termination of the claimant's employment offends the conscience of this Honorable Court;

h. this Honorable Court has, like Industrial Courts and Employment Tribunals in the Commonwealth countries, jurisdiction to protect a contract of employment through injunctions; in England, the injunctions were granted in *Lew -v- The Board of Trustees on behalf of United Synagogue feoul EWHC 1265* and *Jones —v- Gwent County Council ITQQ21 IRLR 5*;

i. through the arbitrary and unconstitutional act, the Respondent is seeking to deprive the claimant of his monthly salary in the sum of over Kshs. 430,000/-;

j. the Respondent has contravened the claimant's rights under Articles 27, 28, 30, 41 and 47 of the constitution to an administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair".

3. This application is also supported by the Supporting Affidavit of the Applicant herein who has deponed on issues in the grounds above and attached evidence of the employment contract. He avers that in the contract, he was to serve as Deputy Chief Finance Officer and his main duties were spelt out. He was to be paid 250,000/= subject to applicable monthly tax. The contract was 5 years and probation period was 6 months.

4. He served from 1st December 2017 and the contract was amended in February 2018. He was to be confirmed subject to satisfactory performance of his duties.

5. He contends that he was to be Department Chief Finance Officer pending the departure of Mr. Jason Ndirangu who was serving as Chief Finance Officer. The Applicant contends that this was the position in principle but no appointment letter to this effect has been produced to Court.

6. The Applicant sought to rely on an email dated 21.3.2018 from the Chief Executive Officer as proof of this appointment. He avers that the Chief Executive Officer finally refused or neglected to issue him with the said letter of appointment varying the terms to reflect assumption of office of the Chief Finance officer.

7. He avers that his letter of 1.12.2017 omitted to indicate he had been recruited as Chief finance Officer.

8. The Applicant was finally terminated and he seeks orders from this Court to reverse the termination amongst other orders.

9. The Respondents opposed this application. They contend that the Applicant was never appointed as a Chief Finance Officer.

10. The Applicant herein sought orders to stop the termination already effected. The orders sought are final orders to determine the entire

claim.

11. It is this Court's position that these orders cannot be granted at this interlocutory stage. I therefore decline to grant orders sought. I dismiss this application and direct main cause to proceed for hearing.

12. Costs in the cause.

Dated and delivered in open Court this 26th day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ndinda holding brief for Kuria for Claimant – Present

Respondents – Absent