



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 733 OF 2018**

(Before Hon. Lady Justice Hellen S. Wasilwa on 23<sup>rd</sup> October, 2018)

JAMLECK THUO MWANGI.....CLAIMANT

-VERSUS-

NEW KENYA COOPERATIVE CREAMERIES LIMITED.....RESPONDENT

**RULING**

1. The Claimant/Applicants filed a Notice of Motion application dated 17<sup>th</sup> May, 2018 through the firm of Ameli Inyangi and Partners Advocates under Certificate of Urgency seeking the following orders that:-

***1. The Application be certified as urgent, service be dispensed with in the first instance and prayer (2) and (3) be granted ex-parte pending the hearing and determination of this application inter-parties.***

***2. A Conservatory Order restraining and/or preventing the Respondent from requiring the Applicant, as a precondition to his remaining in employment, to sign a one-year contract of employment with the Respondent dated 16<sup>th</sup> April, 2018 or indeed any other contract whose terms contravene the express provisions of the Respondent's Human Resource and Administration Procedures Manual and its Performance Management Policy pending the hearing and determination of this Application.***

***3. A Conservatory Order restraining and/or preventing the Respondent from suspending, interdicting, terminating or otherwise howsoever interfering with the present employment of the Applicant or withholding any payment and/or remuneration properly due and owing to the Applicant in the course of employment with the Respondent or harassing and frustrating him by denying his legitimate application for leave pending the hearing and determination of this Application.***

***4. A Declaration that the Performance appraisal process to which the Applicant was subjected to in 2018 culminating in the Respondent's decision to grant the Applicant a one year contract dated the 16<sup>th</sup> april,2018 based on a performance improvement plan was not conducted in adherence to the provisions of the Respondent's Human Resource and Administration Procedures Manual and its Performance Management Policy and is therefore not a credible basis for any decision regarding renewal of the Applicant's contract of employment.***

***5. Costs of the application.***

2. The Respondents opposed this application. They opposed the application by filing the Replying Affidavit sworn by Nixon Sigey - the Managing Director. The said Replying Affidavit on record raises a number of issues in response, among them that: -

***"The Claimant's contract has already been renewed and signed and therefore issues of being compelled to sign the contract do not arise."***

3. They admitted that it is true that Jamleck Thuo Mwangi, **the Claimant** has been serving the Respondent on a fixed term contracts since the year 2012 which has been renewed and remains in place to date as covering the following specific periods:-

***a) Three Year Contract running from May 2012 to 26<sup>th</sup> April,2015;***

***b) Three Year Contract running from 26<sup>th</sup> April,2015 to 26<sup>th</sup> April, 2018; and***

**c) One-year Contract running from 26<sup>th</sup> April, 2018 to 26<sup>th</sup> April, 2019.**

4. They aver that at the time of filing the suit, the Application herein the Claimant had already signed a one (1) year contract with the Respondent and accepted the terms therein which was attached and marked as “MM-1”, a copy of the Letter of Appointment on contract dated 16<sup>th</sup> April, 2018 and signed by the Claimant on 11<sup>th</sup> May, 2018.

5. They contend that clause 4 of the Claimant’s previous Three Year Contract running from 26<sup>th</sup> April, 2015 to 26<sup>th</sup> April, 2018 relevantly provided that the Claimant’s Performance will be reviewed and appraised regularly and documented in meetings with the Claimant’s Controlling Manager.

6. They also contend that Clause 5 of the Claimant’s said Three Year Contract running from 26<sup>th</sup> April, 2015 to 26<sup>th</sup> April, 2018 relevantly provided that the contract may be renewed depending on the Claimant’s and the Respondent’s performance and that the intention to renew the contract is to be mutually agreed upon and may be initiated at least three months before the expiry of the term. [A copy of the said Claimant’s Three Year Contract running from 26<sup>th</sup> April, 2015 to 26<sup>th</sup> April, 2018 has been annexed as annexure JMK-1 to his Supporting Affidavit].

7. The Respondent deny that there is any document binding the Respondent, which provided for renewal of the Claimant’s Contract for a period of three (3) years.

8. They also admit that pursuant to the Contract of Employment, the Claimant was subjected to a performance appraisal in which he was rated to have scored a total of 69.4%. Also that the said performance appraisal was conducted in accordance with the Respondent’s Performance Appraisal Policy which requires joint appraisal after the employee appraises himself/herself. Indeed, the Claimant appraised himself and later a joint appraisal was done on 5<sup>th</sup> April, 2018 something the Claimant acknowledged by signing the appraisal forms with notes and comments therein.

9. They aver that contrary to the Claimant’s assertion a total score of 69.4% is not rated by the Respondent as a GOOD performance but an AVERAGE performance as can be seen at page 22 (Part of the Claimant’s own annexure JMK-4). They contend that having scored the average grade of 69.4%, the Respondent’s Board of Management considered his application for renewal of the contract and renewed his contract for a period of **one (1) year**.

10. The Respondents aver that Section 16.0 of the Respondent’s Management Policy sets out rewards/penalties for various categories of performance rating. The Claimant in this case having attained the average performance of 69.4% was put by the Board under close monitoring for nine (9) months so as to work on the areas of improvement.

11. They also contend that indeed as captured in Clause 4 of the Claimant’s current contract, the Controlling Manager is to appraise the Claimant’s Performance after completion of nine (9) months based on the Performance Improvement Plan and the results thereof to be presented to the Respondent’s Board of Directors for deliberation and decision making.

12. The Respondents submitted that the tasks listed under the Performance Improvement Plan are drawn from the employee’s job description and are in line with the S.M.A.R.T policy of setting goals; specific, measurable, achievable, realistic and timely. They form part of the Employment Contract which was duly acknowledged and accepted by the Claimant.

13. The Respondents further submit that whereas the Claimant has already signed the contract, the nine (9) months period is yet to lapse so as to assess the Claimant’s improvement or otherwise. They aver that they have not issued any letter of termination nor has the management intimated to the Applicant in writing or otherwise that he is to be terminated.

14. In summary, it is the Respondent’s case that the Claimant is currently serving as its employee having signed a fixed one-year contract. That at the time of coming to Court, he had already signed the contract yet he is seeking interim orders restraining the Respondent from forcing him to sign the contract. Yet again, the Respondent having just renewed the Claimant’s contract after the appraisal process, it does not intend to terminate the Claimant from employment. The Respondent therefore sought to have this application dismissed.

15. The Respondent submitted that the Claimant/Applicant in his Memorandum of Claim sought orders similar to those prayed for in the application as follows:-

***1.1 A Declaration that the Performance appraisal process to which the Claimant was subjected in 2018 culminating to the Respondent’s decision to grant the Applicant a one-year employment contract dated the 16<sup>th</sup> April, 2018 based on a performance improvement plan was not conducted in adherence to the provisions of the Respondent’s Performance Management Policy.***

***1.2. A Declaration that the Respondent having neglected its role of properly conducting a credible performance appraisal process in adherence to the provisions of the Performance Management Policy, the Applicant is entitled to a renewal of his contract of employment for a further three-year tenure.***

***1.3 The Respondent offer the Claimant a renewal of his contract of employment for a three-year tenure to which he is entitled in accordance with the Performance Management Policy of the Respondent and in the alternative should the Respondent refuse to do so, the sum of Shs.12, 998,925.10 be paid to the Claimant as damages being the remuneration payable to him to a three-year contract inclusive of gratuity.***

***1.4 Cost of the suit plus interest.***

16. I have considered the averments and submissions of both parties. The issue for Courts determination is whether the Claimant has established he has a prima facie case with a probability of success. The law is settled in respect to the guiding principles in respect to the grant of interlocutory orders. **Giella vs Cassman Brown & Co. Limited [1975] E.A 358** at page 360 held as follows:-

*a) The Applicant must show a prima facie case with probability of success;*

*b) The Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and*c)

*c) If the Court is doubt, it will decide the application on a balance of probability.*

17. On whether the Applicant has established a prima facie case, I note that the Claimant/Applicant came to Court seeking conservatory orders to restrain the Respondent from requiring him, to sign a one-year contract of employment. However, at the time of coming to Court the Claimant had already signed the renewed contract.

18. In his submissions filed in Court on 10<sup>th</sup> July,2018 the Claimant has since admitted that he signed the contract dated 16<sup>th</sup> April, 2018 on 11<sup>th</sup> May,2018 but that this was due to coercion because of the letters reminding him to communicate his position on the extension by a particular date.

19. The Applicant also avers that the Respondent resorted to denying him leave (which was to commence on 14<sup>th</sup> May, 2018) as another example of coercion to sign the contract. If the Claimant signed the leave on 11<sup>th</sup> May as admitted, then this had nothing to do with the denial of leave, which was set to commence after.

20. Based on the fact that the Claimant came to Court seeking to bar renewal of a contract which had already been renewed, it is my finding that the Applicant seeks orders which have been overtaken by events and is therefore not tenable at this stage. It would not make any difference then for this Court to restrain a signing of a contract which has already been signed.

21. It is my finding that the orders sought cannot be granted by the Court at this stage and that the Claimant is capable of being compensated in damages if the Respondents are found to be culpable. I decline to grant the prayers sought and order that the main cause proceeds for full hearings.

22. Costs will be in the cause.

**Dated and delivered in open Court this 23<sup>rd</sup> day of October, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Majao holding brief for Miss Judy for Claimant/Applicant

Respondents – Absent