



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

PETITION NO. 99 OF 2018

ELIZABETH AGUTU ODHIAMBO.....PETITIONER

-VERSUS-

WAUMINI SACCO SOCIETY.....RESPONDENT

RULING

1. The Petitioner/Applicant filed the Notice of Motion herein under Certificate of Urgency on 26th September 2018 seeking the following Orders:

- a) **THAT** the honourable court be pleased to certify this application as **URGENT** and service of the said application on the Respondent be dispensed with at the 1st instance.
- b) **THAT** the honourable court be pleased to order in the interim that there be a conservatory, injunction order restraining the Respondent from removing the petitioner/applicant from her position of marketing manager in accordance with the contract of employment dated 15th September 2017 and/or demoting her to any junior position and or reducing her salary and/or transferring her to any other station other than Nairobi pending the hearing and determination of this application.
- c) **THAT** the Honourable Court be pleased to order in the interim that there be a conservatory injunction order restraining the Respondent from removing the petitioner/applicant from her position of marketing manager in accordance with the contract of employment dated 15th September 2017 and/or demoting her to any junior position and/or reducing her salary and/or transferring her to any other station other than Nairobi pending the hearing and determination of this petition.
- d) **THAT** the honourable court be pleased to grant an order directing the respondent to retain the petitioner/applicant in her position as marketing manager of the respondent without any reduction of salary and without breaching the contract of employment entered into between the petitioner/applicant and the respondent on 15th September 2017 pending the hearing and determination of this petition.
- e) **THAT** the honourable court be pleased to grant an order directing the respondent to retain the petitioner/applicant in her position as marketing manager of the respondent without any reduction of salary and without breaching the contract of employment entered into between the petitioner/applicant and the respondent on 15th September 2017 pending the hearing and determination of this petition.
- f) **THAT** the honourable court be pleased to grant an order restraining the respondent from enlisting any other party other than the petitioner/applicant in the position of marketing manager pending the hearing and determination of this petition.

g) **THAT** the honourable court be pleased to grant an order restraining the respondent from enlisting any other party other than the petitioner/applicant in the position of marketing manager pending the hearing and determination of this petition.

h) **THAT** the honorable court be pleased to grant any other order as it may deem fit in the circumstances.

i) **THAT** the respondent be condemned to pay costs of this application.

2. The application is supported by the applicant's Affidavits sworn on 26th September 2018 and 25.10.2018 and is premised on the following grounds set out on the body of the motion:

a) **THAT** the Respondent is in breach of Article 41 (1) of the Constitution and its own human resource policy and is also in breach of the subsisting contract of employment dated 15th September 2017 between itself and the petitioner/applicant by demoting the petitioner/applicant from the position of marketing manager to a customer care officer and by reducing her salary from Kshs. 110,000 to Kshs. 75,000 and transferring her from Nairobi to Nakuru thereby detaching and separating her from her family.

b) **THAT** it is in the circumstances hereof URGENT that an injunctive/conservatory order be in place pending the hearing and determination of this petition so that the same is not overtaken by events since the petitioner stands to suffer substantial, irreparable loss as a consequence thereof should the contents of the respondent's letter dated 19/9/2018 be implemented and enforced.

c) **THAT** the respondent has, additionally discriminated against the petitioner/applicant in all aspects by among others, refusing to increase her salary while the rest of her colleague's salaries have been increased. This notwithstanding the fact that the petitioner/applicant has in her position performed beyond expectation by meeting her targets. She has, over time, realized a high projector for the respondent company resulting in its increased membership financial base.

d) **THAT** the petitioner /applicant's petition filed has high chances of success.

e) **THAT** It is in the interest of justice that a conservatory, injunctive order be in place pending the hearing and determination of this petition.

3. The Applicant avers in her Supporting Affidavit that since assuming the position of Marketing Manager she has diligently and successfully performed her duties. She further avers that she was surprised when she was called for a board meeting on 14th June 2018 and informed that her appointment was unprocedural and would therefore be demoted.

4. The Applicant further avers that the allegation that her appointment is unprocedural is a smokescreen to punish her since the respondent has been expanding, a FOSA officer was promoted together with her and the FOSA officer's salary increased. Moreover, she did not apply for position of customer care officer in Nakuru which was advertised but is now expected to transfer to Nakuru.

5. The Respondent opposed the Application in its Replying Affidavit sworn by Sylvia Gumo, the Respondent's Honorary Secretary. Subsequently, each of the parties filed Further Affidavits in response to the issues raised.

6. The Respondent contends that the Applicant did not apply for the position of Marketing Manager when the same was advertised. The Board of Directors had carried out interviews on 10th June 2017 after the shortlisting of the candidates but there was no suitable candidate was identified and resolved that the position be re-advertised. Hence, on 13th September 2017 the respondent's Executive Committee appointed Coop Consultancy firm to re-advertise the position in their website. The Consultancy firm made its recommendations and thereafter a 2 member Executive Committee made the unilateral decision appointing the Applicant to the position of Marketing Manager.

7. The Respondent further contends that the unilateral decision made by the two Executive Committee Members was never presented to the Board of directors for ratification and therefore the decision to appoint the marketing manager was null and void ab initio. Further, the Applicant had not met the qualifications for the appointment to the position of marketing manager and that Clause 2.4, 2.74 and 2.75 of the Human Resource Policy were grossly violated.

8. The Respondent further contends that during a joint Board and Supervisory committee meeting held on 30th May 2018 agreed that the Applicant's appointment to the position of marketing manager should be nullified and the position re-advertised. The Executive committee meeting held on 12th September 2018 resolved that the Petitioner /Applicant be informed of the decision that she would be re-deployed to her former position as an officer whose only opening was in Nakuru.

9. The Respondent further avers that upon re-advertisement of the position of in the Daily Nation newspaper on 20th June 2018 and having conducted interviews, the Executive Committee and the Chief Executive Officer recommended that the position be filled by one of the best three candidates from the interviews.

10. The Petitioner/Applicant filed a Further Affidavit in which she avers that there clear malice on the Respondent's directors in the matter since it is questionable why the Respondent took almost one year to realize there was a mistake to be corrected. The Applicant further avers that the purported minutes annexed to the Replying Affidavit are not the true minutes of the respondent and that she is a victim of an incident that took place between her and the Chairman while on trip in Kikumini for her refusal to pay money from her own pocket.

11. The Respondent thereafter filed a Further Affidavit sworn by Sylvia Ngumo disputing the allegations in the Applicant's further affidavit by contending that the Applicant was an author of her own misfortune for **having failed to account for the funds obtained from the Respondent for the trip to Kikumini.**

Applicant's submissions

12. The Applicant submits that the letter dated 19th September 2018 redeploying the Applicant is in breach of section 6.13.1 of the respondent's own human resource policy guideline which stipulates:

"6.13.1 when there is reOrganisation of designation of a staff

member from a higher or a lower position, the same can only happen in instances where

i. A staff has made a request for such demotion on his/her own volition.

ii. The said staff is unable to cope with the requirements of the higher position.

iii. Demotion can also only take place on reorganization of the company for which an employee voluntarily accepts a lower grade.

iv. Demotion can equally apply in cases where a staff returns to work after a long absence.

13. The Applicant further submits that the Respondent has largely breached and violated her rights provided for under Article 41 (1) of the Constitution that mandates the Respondent to exercise fair labour practices.

14. The Applicant submits that it was pure malice that for the Respondent to purport to demote, reduce salary and transfer her. The Applicant further submits that such malice is depicted in the Respondent's email communication amongst the directors dated 19th September 2017.

15. The Applicant further submits that two of the Respondent's directors had personal differences with the Applicant. The Applicant further submits that the Respondent's 2 directors had personal difference with the Applicant.

16. The applicant relies on **Margaret Wanja Muthui v Ministry of Transport, Infrastructure, Housing and Urban Development Petition No. 11 of 2017 & 2 others and Yatich Kagungo v Kenya Airports Authority & 2 Others.**

Respondent's Submissions

17. The Respondent submits that the Applicant has not exhibited any evidence that she was not accorded fair labour practices under article 41 (1) of the Constitution since she did not apply for the position of marketing a manager when the same was internally advertised and she did not have the requisite qualifications. Further, that the Respondent did not also apply for the position when the same was re-advertised due to lack of qualifications.

18. The Respondent submits that it is not in breach of its own Human Resources Policy and in particular Clause 6.13.1. Clause 6.13.2 of the Human Resource Policy envisages a situation where re employee was lawfully and legally employed which is not the position in this matter.

19. The Respondent further submits that the orders being sought by the applicant are incapable of being granted for the reason that they are premised on an unlawful and/or illegal contract which was not sanctioned by the Board of Directors as per the Human resource Policy.

20. The Respondent further submits that the Applicant is not entitled to the orders sought since she has not established a prim facie case against the Respondent with a probability of success and has failed to meet the requirements set in **Giella v Cassman Brown [1973]EA**

358. Further, that the Applicant has failed to show that she stands to suffer irreparable injury which cannot be compensated by way of damages and that in the absence of convenience the Respondent stands to suffer.

21. The Respondent submits that the case of **Margaret Wanja Muthui v Ministry of Transport, Infrastructure, Housing and Urban Development & 2 Others ELRC Petition No.11 of 2017** was not applicable in this case since the issues in that case was the deployment of the Petitioner to another ministry while she was qualified to do what she was employed to do. Further, that the decision in **Yatich Kagungo v Kenya Airports Authority & 2 Others ELRC Cause 2032 of 2016** is not applicable in the instant case because the Petitioner's services in the said authority were duly terminated.

Analysis and determination

22. There is no dispute that the Applicant was appointed to the position of Marketing Manager pursuant to the Executive Committee meeting held on 13th September 2017 recommending for internal recruitment from among the staff. There is further no dispute that the petitioner herein was recommended for the appointment by the Respondent's Chief Executive Officer on 22.9.2017 for the reason she had always undertake marketing activities despite being in customer care.

23. It is also common knowledge that the respondent's Board rescinded the Applicant's appointment on ground that it was a nullity because the petitioner lacked the requisite qualification and the decision to appoint her, made by 2 Executive Committee members, was never presented to the Board for ratification. Finally, there is no dispute that the board decided to redeploy the petitioner to her former position and transferred her to Nakuru branch where the vacancy was in existence but she protested requesting to be retained in Nairobi as HR officer.

24. In view of the foregoing summary of facts, I see no public interest in granting the orders sought by the applicant and as such the prayer for conservatory relief does not arise. The dispute is purely private law claim founded on a commercial contract between private citizens. Consequently, the only relevant issue for determination is whether the petitioner has met the threshold for grant of interlocutory injunction as enunciated by **Giella v Cassman Brown [1973]EA 358** which is:

- a) The applicant must demonstrate a prima facie with probability of success; and
- b) That irreparable harm will be occasioned to her if the order is withheld.
- c) If the court is in doubt, it should decide the case on a balance of convenience.

Prima facie case with chances of success.

25. Prima facie was defined by the Court of Appeal in **Mrao limited v First American Bank of Africa Ltd & 2 Others [2003]eKLR** in the following words:

“a prima facie case includes but is not limited to ‘ a genuine and arguable case’. It is a case in 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.”

26. In this case the claimant contends that she was promoted to the position of marketing manager by the respondent without making any application for the position and after working for almost a year the promotion was rescinded. To make the matters worse she was demoted to junior position, her salary reduced by substantial amount and then transferred from Nairobi to Nakuru. She contends that her right to fair labour practices have been violated by the respondent's unfair said decisions.

27. The respondent has on the other hand denied the alleged violation of the petitioner's labour rights and averred that her appointment to the position to the position of Marketing Manager was void because she was not qualified for the job and the decision to appoint her was by 2 members of the Executive committee which was never ratified by the respondent's board which is the appointing authority.

28. I have carefully considered the materials presented to me and confirmed that the under clause 1.12.17 of the respondent's HR Policy, the appointing authority of the Senior officers of the respondent is the Board. I have also confirmed that the appointment of the petitioner to the post of Marketing Manager was by the CEO pursuant to recommendation by 2 members of the Executive committee. I have further confirmed that the said appointment was never received well by a good number of the board members and it was indeed rescinded and the claimant notified. Finally, the claimant accepted the decision of the board to rescind the position but protested the decision to transfer her from Nairobi because after all she never caused the quagmire she found herself by applying for the rescinded appointment.

29. Flowing from the foregoing facts, it appears to me that the petitioner's complaint is not so much to do with the rescinding of her promotion but the inconveniences of leaving Nairobi office because of matters she did not provoke. I, however do not think that she can really run away from the fact the promotion was not forced on her. While fully aware that she was not qualified for the same, she never relinquished the same immediately she learned that the board had raised concern over her qualification and the procedure followed in recruiting her. She knew that the job was advertised but she neither competed for the same nor sought injunction to stop the recruitment of a qualified Marketing Manager.

30. My understanding of the petitioner's case is that she is neither qualified for the position of Marking Manager nor is she interested in that job because in her own words, she never applied for it. Her interest is to remain in Nairobi office. Consequently, and on a preponderance of

evidence, I find that the claimant has not proved that her rights under her employment contract have been or are about to be breached by her redeployment to her former grade, and by the recruitment of a qualified marketing manager.

Irreparable harm

31. After failure by the applicant to prove a prima facie case with probability of success, there is no need of considering whether or not the applicant stands to suffer irreparable harm. Irreparable harm is one which cannot be quantified in monetary terms or one which cannot adequately be compensated by damages. Considering the facts of this case, even if the petitioner had established a prima facie case with probability of success, I don't think injunction would have issued because the injury occasioned by the redeployment and transfer can still be quantified into monetary terms.

Balance of convenience

32. In view of the foregoing finding on the first two principles of interlocutory injunction, I do not need to deal with the issue of balance of convenience because the principles of granting interlocutory injunction are cumulative. Suffice it say, however, that even where the applicant has proved a prima facie case and irreparable harm, the court is enjoined to consider the balance of convenience because the injunctions commonly sought by employees against their employers have the effect of reinstating the employee before trial or interfering with managerial prerogatives.

33. While each case should be dealt with on its own merits, the court should always evaluate the extent of the harm that would result to the contestants if the injunction is withheld or if it is granted. The court should take whichever course that appears to carry the lower risk of injustice should it, in the long run turn out that it was misled.

34. Rika J summed up the issue well in *Alfred Nyungu Kimungui V Bomas Of Kenya*[2013]eKLR when he held, thus:

“The Industrial Court should be cautious in exercising its jurisdiction, so as not to appear to take over and exercise managerial prerogatives at workplaces. Grant of interim orders that have the effect of limiting genuine exercise by management of its rights at the workplace, should be avoided. Termination of employment, and initiation of disciplinary processes at the workplace, are presumed to be management prerogatives. The Court should be slow in intervening, particularly at interlocutory stages, otherwise the Court would be deemed to be directing the employers in regulation of their employees.”

Conclusion and disposition

35. I have found that the applicant has not proved that her rights under her contract of service have been or are about to be infringed by the respondent through her redeployment, transfer and recruitment of a qualified person to fill the vacant position of Marketing Manager. I have also found that the applicant has not proved that she will suffer irreparable harm if the injunction order is withheld. Consequently, his Notice of motion 26.9.2018 is dismissed with no costs.

Dated, Signed and Delivered at Nairobi this 20th day of December, 2018

ONESMUS N. MAKAU JUDGE