



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**MISCELLANEOUS NO. 58 OF 2018**

(Before Hon. Justice Hellen S. Wasilwa on 11<sup>th</sup> December, 2018)

ANGELA NDAMBUKI.....APPLICANT

VERSUS

KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY.....RESPONDENT

**RULING**

1. The Applicant, Angela Ndambuki, filed a Notice of Motion Application dated 13<sup>th</sup> June, 2018 brought under Section 17 of the Arbitration Act 1995 and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016 against the Respondent, Kenya National Chamber of Commerce & Industry (KNCCI) seeking several orders as follows:-

1. ***“THAT this application be certified as urgent and heard ex-parte in the first instance.***
2. ***THAT pending the hearing and determination of this application inter partes, this Honourable Court be pleased to grant an interim order staying the Respondent’s letter dated 22<sup>nd</sup> May 2018 terminating the Applicant’s employment as the chief executive officer of the Respondent with all the consequential acts arising from the letter.***
3. ***THAT pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue an order restraining the Respondent or its agents from making any appointment or conducting any recruitment aimed at substantively filling the position of Chief Executive Officer of the Respondent.***
4. ***THAT pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue an order restraining the Respondent or its agents from discussing or making any decision on the employment or the purported termination of the Applicant as the Chief Executive Officer of the Respondent at the Board meeting scheduled on 14<sup>th</sup> June 2018.***
5. ***THAT pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue a conservatory order maintaining the status quo ante the Respondent’s letter of 22<sup>nd</sup> May 2018 by allowing the Applicant to continue in her position as the Chief Executive Officer of the Respondent and to discharge her duties under the Employment Agreement between the Applicant and the Respondent dated 1<sup>st</sup> October 2017.***
6. ***THAT pending the reference of the dispute herein to arbitration and the hearing and determination thereon, this Honourable Court be pleased to issue an order restraining the Respondent or its agents from making any appointment or conducting any recruitment aimed at substantively filling the position of Chief Executive Officer of the Respondent.***
7. ***THAT pending the reference of the dispute herein to arbitration and the hearing and determination thereon, this Honourable Court be pleased to issue a conservatory order maintaining the status quo ante the Respondent’s letter of 22<sup>nd</sup> May 2018 by allowing the Applicant to continue in her position as the Chief Executive Officer of the Respondent and to discharge her duties under the Employment Agreement between the Applicant and the Respondent dated 1<sup>st</sup> October 2017.***
8. ***THAT the Respondent bears the costs of this Application”.***

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

1. On 1<sup>st</sup> October 2017, the Respondent employed the Applicant as its Chief Executive Officer (CEO) for a fixed term of 3 years renewable and subject to a probation period of an initial 6 months.

2. The Applicant's probation was not extended and thereby she stood constructively confirmed in employment as at 1<sup>st</sup> April 2018, being the expiry of the 6 months' probation period.

3. In a letter dated 22<sup>nd</sup> May 2018, the national Chairman of the Respondent purported to terminate the employment of the Applicant.

4. The purported termination was done without the requisite resolution of the Board of Directors or of a committee of the Respondent.

5. The said termination contravened the provisions of Clause 17.44 b & c of the Respondent's Human Resource Policies Procedure Manual (HRPP Manual).

6. The reasons given by the National Chairman in the letter dated 22/05/2018 for the purported termination are not valid reasons under the Employment Act, 2007.

7. The Applicant was not accorded any opportunity to be heard before the purported termination.

8. The said termination was done without any notice contrary to the provisions of Clause 12A of the Employment Agreement.

9. Clause 14 of the Arbitration Agreement between the Claimant and the Respondent dated 01/10/2017 contains an arbitration clause.

10. The Respondent has scheduled a Board Meeting on 14<sup>th</sup> June 2018 in which one of the items on the agenda for consideration is the purported termination of the Applicant's employment.

11. If the prayers sought herein are not granted, the Respondent may substantively fill the CEO's position thus rendering nugatory the intended Arbitration proceedings for reinstatement and setting aside of the termination letter dated 22/05/2018 which would occasion a great injustice to the Applicant.

12. It is therefore just, equitable and in the interests of justice that the Application herein be allowed.

3. In her Supporting Affidavit, the Applicant avers that having been constructively confirmed in employment as at 01/04/2018, she was entitled to all the benefits available to an employee of the Respondent including termination, to the extent the same did not contradict the Employment Act. That according to Article 102 of the Respondent's Articles of Association, any appointed CEO may only be removed by the Board of Directors and because she is aware no board meeting was convened to consider her termination, the purported decision contained in the letter dated 22/05/2018 is inconsequential and therefore null and void. Further, that the decision to terminate her employment reeks of malice and vendetta by the Respondent's national Chairman and the Board Executive Committee against her.

4. That if there was a valid reason, then the said letter was still premature, unprocedural and unwarranted for the following reasons:-

i) It contravened Clause 17.44b of the Respondent's HRPP Manual by issuing her with two instead of the requisite three warning letters before terminating her employment.

ii) Her termination of employment did not precede performance counselling and progressive discipline as per Clause 17.44c.

iii) No performance appraisal was done to gauge her performance prior to her termination of employment and she was only issued with Key Performance Indicators (KPI) on the date of the purported termination.

iv) The allegation of low morale among staff of the Respondent was not preceded by appropriate parameters or assessment tools such as Employee Satisfaction Survey for the 8 months she worked for the Respondent.

v) The Respondent's financial position improved for the first 4 months in 2018 compared to 2017.

vi) She was requested to suggest a competent IT person that she had previously worked with which she did and further to that, declared the conflict of interest during his interview.

vii) She was not accorded any opportunity to be heard before the purported termination of employment and was not given any notice or paid in lieu of notice.

5. Upon the matter coming up for *inter partes* hearing of this Application, this Honourable Court ordered on 27<sup>th</sup> June, 2018 that:-

1. Pending the reference of the dispute herein to arbitration and the hearing and determination thereon, an order is hereby issued restraining the Respondent of its agents from making any appointment or conducting any recruitment aimed at

*substantively filling the position of Chief Executive Officer of the Respondent.*

*2. The Respondent to file their response within 7 days.*

*3. Mention to be on 3/07/2018 to confirm payment of Applicant's salary.*

6. In the Supplementary Affidavit filed on 15/08/2018 and sworn by a member of the Respondent's Board of Directors (B.O.D), Mr. Abdulwalli Shariff, he avers that while he is entitled to notice of a meeting of the B.O.D convened to consider the removal or termination of the employment of the CEO, at no time prior to 22/05/2018 was she served with any notice for a meeting to discuss the same. That she was therefore surprised to learn of the purported termination of the CEO without any meeting or resolution of the B.O.D in favour of the termination.

7. She states that the decision in the letter dated 22/05/2018 is not a decision of the Respondent's B.O.D and that it is ultra vires for all intents and purposes. Further, that the decision ought to be withdrawn to allow the Applicant resume her duties as the CEO pending consideration and decision by the B.O.D on the matter.

### **Respondent's Case**

8. The Respondent filed a Replying Affidavit on 3rd July 2018 dated 2nd July 2018 by Edward Tenge, one of the Directors of the Respondent, who avers that prayers 1-5 of the Application are spent and therefore not capable of being granted. It admits on the agreed period of engagement between itself and the Applicant but states that she failed to perform to the expected professional standards within the terms of engagement and grossly misconducted herself on several occasions. Further, that she had a poor working relationship with its Board and its employees among other integrity issues.

9. The Respondent avers that the Applicant was verbally warned several times culminating into written warning letters informing her of areas of fault and which she unequivocally admits in her *annexure 4*. That in rebuttal, she expressly guaranteed performance and persuaded its Board of Directors to give her a second chance by extending her probation period for an additional 3 months.

10. That it is during this probation extension the Respondent discovered that she was in breach of trust when she fraudulently connived to hire an employee through deliberate failure to disclose conflict of interest and manipulating the recruitment and placement process. Further, she altered the position advertised by the Respondent from Information Communication Technology Consultant to Information Communication Manager.

11. It avers that upon further investigation, it discovered that the irregularly recruited and hired Mr. Samuel Moseki Momanyi is the same person who had recommended the Applicant for its CEO position. It then contracted an independent IT Firm to conduct a competency assessment in respect of the said Samuel Momanyi and they were shocked to learn from the firm that the Applicant had interfered with the assessment process by insisting that her preferred candidate should not be subjected to a written assessment test. That her aforementioned actions constituted gross misconduct which led to her summary dismissal in accordance with the Employment Act.

12. The Director avers that he knows the Applicant was never confirmed as an employee of the Respondent as alleged or at all and that her probation extension which she admitted to in her demand letter dated 25/05/2018 was duly communicated to her in writing. That because of the highlighted gross misconduct and breach of trust, her relationship with the Respondent became irredeemable and also, the order for reinstatement is not legally available in the circumstances.

13. The Respondent contends that pursuant to its contract with the Applicant, in case of a dispute they ought to submit themselves to an arbitration process, which the Applicant has deliberately failed to invoke to date before mounting the instant proceedings. That the Application is therefore in bad faith and they pray that the same be dismissed with costs.

### **Applicant's Submissions**

14. The Applicant submits that the issues for determination are:-

*1. Whether this Application is properly before this Honourable Court.*

*2. Whether the interim measure of protection sought by the Applicant is merited.*

*3. Who bears the costs of the Application?*

15. It is her submission that **Section 7 (1) of the Arbitration Act 1995** provides: "*It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings an interim measure of protection and for the High Court to grant that measure.*" That this Court has jurisdiction to this dispute by virtue of **Section 12(1), (3) (i) of the Employment & Labour Relations Court Act** and thus any party to an Arbitration Agreement may move this Court for interim measures of protection prior to the commencement of the arbitral proceedings. She cites the case of **Smatt Construction Company Limited vs County Government of Kakamega (2016) eKLR** where Lady Justice Sitati, explained by stating that:-

*"17. What Nyamu J. was saying is that a Court, like this one, hearing an application for an order for interim protection does not and must not go into the merits of the case. Further, that there need not be a suit in the sense understood by the respondent herein. Any order to be issued in a case of this nature serves the purpose of holding the status quo pending the outcome of the arbitral*

proceedings.”

16. She submits that she is not seeking to determine the dispute on its merits but that it is evident from the orders she seeks a conservatory order maintaining the status quo ante the Respondent’s letter of 22<sup>nd</sup> May 2018 by allowing the Applicant to continue in her position as the Chief Executive Officer of the Respondent and to discharge her duties under the Employment Agreement between the Applicant and the Respondent dated 1<sup>st</sup> October 2017 pending the reference of the dispute herein to arbitration and the hearing and determination thereon. She states that notwithstanding the absence of a substantive suit filed with this Application, the Application is properly before the Court and she relies in the case of Joseph Kibowen Chemior -vs- William C. Kiseru [2013] where the Court held, inter alia, that:-

“...there are times when all that a person wants is an order of Court where the rights of the parties are not going to be determined. There is no “action” being enforced or tried. In many such instances, it is the discretion of the Court being sought or a procedural issue sought to be endorsed. The Court in such a case is not being asked to determine any rights of the parties. Now the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no “action”. In such instances I think it is permissible for such a person to file a miscellaneous application because the Court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the Court which does not settle any rights of the parties.....”

17. The Applicant submits that Article 95 of the Respondent’s Articles of Association provides that deliberations and decisions of any Committee of the Board of Directors must be tabled for approval at a meeting of the Board of Directors and since that did not happen, the purported “consultation” or decision to terminate the Applicant’s employment by the national chairman cannot be deemed a decision of the Respondent.

18. It is her submission that her employment was confirmed by default in the absence of any contract extension as required by Section 42(2) of Employment Act, 2007 which provides that:-

“A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee”.

19. That at no time to this Application was she consulted by the Respondent prior to its decision to purportedly extend her probation period and that the Respondent merely communicated its decision without the necessary agreement as per Section 42(2) above and that consequently as at 22/05/2018, she was not on probation.

20. She submits that unless the order sought for interim measure of protection pending reference of the dispute to arbitration and determination thereon is granted, she stands to be prejudiced by the apparent irregular and unlawful acts or omissions of the Respondent and/or its officers. She cites Ezra Chiloba vs Wafula Chebukati & 7 Others ELRC No. 29 of 2018 where a termination or attempted termination was tainted by procedural hiccups. She finally submits that costs of the application be awarded to the Applicant.

#### Respondent’s Submissions

21. The Respondent submits that the Application raises the following legal issues: whether the termination was justified; and whether the Applicant should be granted the order for reinstatement.

22. It submits that its Board of Director’s meeting was convened on 18th April 2018 with an agenda inter alia, to evaluate the Applicant’s performance and determine whether to confirm her employment or to terminate the same and that it is during this meeting that the Directors relayed their concerns towards her misconduct, integrity issues and attitudes before being given a second chance. That Section 42 of the Employment Act provides that Section 41 of the Act which relates to notification and hearing before termination on grounds of misconduct shall not apply where a termination of employment terminates a probationary contract.

23. Further, that Sections 43 and 45 of the Act shall not apply to cases where the employee is still on probation and that therefore the Applicant cannot be afforded the same protection afforded to regular employees under the unfair termination provisions as was stated in the case of Carole Nyambura Thiga -vs-Oxfam [2013] eKLR where the Court stated that employment during probation is at will. The protections afforded to regular employees under the unfair dismissal laws are not available to employees whose contracts are terminated while on probation.

24. The Respondent submits that since the Applicant’s employment was terminated during probation, she is not entitled to the order of *Reinstatement* provided for in **Section 45 of the Employment Act** as one of the remedies for unfair termination and summary dismissal. That if the Applicant is to be granted the said order then the decision should be guided by the principles provided under **Section 49 of the Employment Act**, which include but are not limited to the practicability of reinstatement or re-engagement and the conduct of the employee, which to any extent caused or contributed to the termination. Furthermore, that the remedy is not an automatic right of an employee as was stated by Maraga J as he was then, in the case of Kenya Airways Limited -vs- Aviation & Allied Workers Union Kenya & 3 others [2014] eAZA\* where he stated that:-

*“Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied such as the traditional common law position that courts will not force parties in a personal relationship to continue in such a relationship against the will of one of them. That essentially engenders friction which is not healthy for business.”*

25. In addition, the Respondent submits that reinstatement cannot be issued provisionally where termination has already taken effect and it

relies in the case of **Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers -vs- Social Service League M.P Shah Hospital [2014] eKLR** where it was noted that reinstatement is a substantive remedy and not a provisional relief. That the interim orders already granted will suffice in the given circumstances and finally submits that this Honourable Court dismiss the Applicant's Application with costs.

26. I have examined the averments of the Parties. I note that by virtue of Section 7(1) of the Arbitration Act 1995, any Party who is subject to an Arbitration Agreement may request the High Court for some interim measures of protection pending the process of arbitration. This is what the Applicant has sought before this Court.

27. At this time, this Court is not expected to go into the merits of the suit but to exercise its discretion to ensure grave damage does not occur pending the institution of the arbitral process.

28. I however note that the order being sought by the Applicant will have the net effect of reinstating an employee who has been terminated without considering the merits or otherwise of the case.

29. This in my view will not work for the best interest of the Parties. It is my believe that the Applicant can be compensated in damages if the action of the Respondent is found to be unfair.

30. In the circumstances, it is my finding that the orders sought are not tenable and I decline to grant them. I direct that the Parties should proceed with the Arbitral process as provided for in the Articles of Association of the Respondent.

31. Costs to abide the outcome of the Arbitral process.

**Dated and delivered in open Court this 11<sup>th</sup> day of December, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Malonza for Applicant – Present

Onawa for Respondent