



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO.16 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 3rd December, 2018)

JULIET INDETIE.....APPLICANT

VERSUS

ELIJAH CHINGOSHO.....1ST RESPONDENT

AFRICAN AIRLINES ASSOCIATION (AFRAA).....2ND RESPONDENT

RULING

1. The Applicant/Claimant herein filed a Notice of Motion application dated 20th July 2018 and brought Rule 17 of the Employment and Labour Relations Court Rules 2016, the Employment and Labour Relations Court Act Cap 234B, the Employment Act Cap 266, the Constitution of Kenya 2010, and Section 1A and 1B, 3 and 3A of the Civil Procedure Act, Cap 21 and all other enabling provisions of the law.

2. The Applicant sought the following orders:-

1. "THAT this Application be certified as urgent and the service of the same be dispensed with in the first instance and the same be heard on a priority basis.

2. THAT this Honourable Court be pleased to issue an injunction restraining the 2nd Respondent either by itself or through its agents or officials from advertising, recruiting and/or interviewing for the position of Senior Manager Corporate, Finance and Administration, Deputy Director Corporate, Finance and Administration or any such other similar position that holds similar responsibilities pending the hearing and determination of this Application.

3. THAT this Honourable Court be pleased to order the Respondent to pull down the advertisement of the position of Senior Manager Corporate, Finance and Administration and to place another advertisement notifying of the cancellation of the advertisement of the position of Senior Manager Corporate, Finance and Administration.

4. THAT this Honourable Court be pleased to issue an injunction restraining the 2nd Respondent from advertising, interviewing and/or recruiting for the position of Senior Manager Corporate Finance and Administration, Deputy Director Corporate, Finance and Administration or any such other similar position that holds similar responsibilities pending the hearing and determination of Civil Appeal No. 287 of 2017.

5. THAT this Honourable Court be pleased to issue an injunction restraining the 2nd Respondent from advertising, interviewing and/or recruiting for the position of Senior Manager Corporate Finance and Administration, Deputy Director Corporate, Finance and Administration or any such other similar position that holds similar responsibilities pending the conclusion of the litigation process.

6. THAT this Honourable Court be pleased to grant such directions and other or further Orders as it may deem fit to grant.

7. THAT cost of this Application be provided for.

3. The application is also made on the following grounds:-

a) *“THAT by a DECREE given on the 27th of November 2017, this Honourable Court did interlia: quash the entire proceedings, deliberations and decisions of the Disciplinary Committee chaired by the 1st Respondent and the consequential Summary Dismissal Letter authored by the 1st Respondent and dated 15th August, 2016.*

b) *THAT the Respondents have since deliberately and most contemptuously disobeyed the DECREE of this Honourable Court given on 27th November, 2017 by advertising for the post of Senior Manager Corporate, Finance and Administration whose overall responsibilities are similar to the Applicant’s position of Deputy Director Corporate, Finance and Administration at the 2nd Respondent.*

c) *THAT the full purport of the Judgment was to reinstate the Applicant’s employment with the Respondent, a fact that is not disputed and was admitted by the Respondent vide their letter to the Applicant dated 5th December, 2017 which stated “ ...your judicial review application was allowed with the effect that you were reinstated back to the office”.*

d) *THAT there is a pending appeal at the Court of Appeal being Civil Appeal No. 287 of 2017 by the Respondents and the Respondents cannot purport to advertise for the position of Senior Manager- Corporate, Finance and Administration prior to the hearing and determination of that appeal.*

e) *THAT pursuant to the DECREE, the Applicant did report to work on 5th December, 2017 when she went on twenty one (21 days) compulsory leave to enable the Respondent make logistical arrangements for her reinstatement. The compulsory leave was further extended for a period of forty five (45) days vide a letter dated 10th January, 2018.*

f) *THAT the Respondents are estopped by their own conduct and continued participation in the litigation process from advertising the position of Senior Manager Corporate, Finance and Administration which position has similar duties and responsibilities to the Applicant’s position of Deputy Director- Corporate, Finance and Administration.*

g) *THAT the Applicant has legitimate expectation that her case will not only be heard and determined but that she will be allowed to enjoy the fruits of her litigation and unless urgent Orders are granted, the entire litigation will be rendered nugatory.*

4. The application is also supported by the Supporting Affidavit of Juliet Indetie herein deponed on 20th July 2018 and whose averments reiterate the facts in the above grounds.

5. She contends that the full import of this Court’s judgement was to reinstate her to her position and therefore the decision to advertise for her post will leave her bare. She also attached evidence of her employment relationship with the Respondent and also evidence of the averments made herein.

6. The Respondents opposed this Application through a Replying Affidavit filed in Court on 11.9.2018 deponed to by the 2nd Respondent’s Secretary General. There are many averments in the Affidavit but one that stands out is the fact that the Respondents obtained an order from the Court of Appeal on 6/7/2018 staying execution of this Court’s judgement. They therefore submitted that this Court is functus officio.

7. I do note that indeed the Court of Appeal is now seized on this matter having rendered a ruling on 6/7/2018 staying execution of this Court’s judgement dated 27.11.2017.

8. Given that scenario, this Court cannot continue to entertain any application from the Parties herein. It is my finding that I am *functus officio* and I decline to deliberate into the merits or otherwise of the application before me.

9. Costs to abide the outcome of the appeal.

Dated and delivered in open Court this 3rd day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ochiel holding brief for Njuguna for Applicant – Present

Respondent – Absent