



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO 131 OF 2016

IN THE MATTER OF ARTICLES 3, 10, 19, 20, 21, 25,41,47, 50, 159, 162(2),165(5)(b)

236 OF THE CONSTITUTION OF KENYA, 2010 AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 20, 27, 41, 47, 50, 73, 232 AND 236 OF
THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF THE ENFORCEMENT
OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 41 OF THE EMPLOYMENT ACT, 2007

AND

**IN THE MATTER OF SECTIONS 5, 6, 7, 8 & 10 OF THE PUBLIC SERVICE (VALUES
AND PRINCIPLES) ACT NO. 1A OF 2015**

AND

IN THE MATTER OF STATE CORPORATIONS ACT, CAP 446 LAWS OF KENYA

AND

**AND IN THE MATTER IF SECTIONS 9, 10, 11 & 12 OF PUBLIC OFFICER ETHICS ACT,
CAP 183 OF 2003**

AND

**IN THE MATTER OF SECTIONS 8, 9, 10 & 15 OF LEADERSHIP & INTEGRITY ACT
CAP 182 OF 2012**

AND

**IN THE MATTER OF SECTIONS 4, 6, 7, 8, 9 & 11 OF THE FAIR ADMINISTRATIVE
ACTIONS ACT NO. 4 OF 2015**

AND

IN THE MATTER OF THE MWONGOZO CODE OF GOVERNANCE FOR STATE CORPORATIONS

AND

IN THE MATTER OF RULES 4, 10, 11, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

NORAH OKOTH.....PETITIONER

VERSUS

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

RULING

1. The Petitioner's application brought by Notice of Motion dated 24th October 2016 seeks the following prayers:

- a) That pending the determination of the Petition the Court issues a conservatory order of stay of implementation of the letter of termination of the Petitioner's employment dated 16th May 2016;
- b) That pending the determination of the Petition, the Court issues a conservatory order prohibiting the Respondent and/or its agents and/or its officers from shortlisting, interviewing, filling and recruiting any person to the advertised position of Company Secretary, KPC/ADVT/34/2016 in the Daily Nation Newspaper of 3rd October 2016, a position that belongs to the Petitioner;
- c) Reinstatement of the Petitioner to the position she held prior to the said termination of employment without any loss of rank, salary, allowances and benefits.

2. The application which is supported by the Petitioner's affidavit sworn on 25th October 2016 is based on the following grounds:

- a) The termination of the Petitioner's employment as contained in letter of termination dated 5th August 2015 has violated the Petitioner's rights as set out under the Constitution, the Employment Act, the Fair Administrative Action Act, the Public Officer Ethics Act, the State Corporations Act, *Mwongozo* Code of Governance for State Corporations and the Respondent's Staff Rules and Regulations, 2015;
- b) The Respondent has acted in an opaque, inimical and noxious manner by denying the Petitioner a right to fair hearing before an independent and impartial tribunal as guaranteed under Article 47 of the Constitution of Kenya, the Fair Administrative Action Act, the *Mwongozo* Code of Governance for State Corporations and the Respondent's Staff Rules and Regulations, 2015;
- c) The Respondent's pernicious and ill-disposed actions of subjecting the Petitioner to a tribunal chaired and attended by her accusers prior to the termination, were in breach and violation of the rules of natural justice as enshrined in Article 47 of the Constitution of Kenya, 2010 as the Respondent acted as an accuser, prosecutor and judge over the Petitioner;
- d) The decision to terminate the Petitioner's employment was made without jurisdiction and is spurious and ungrounded in material respect as John Ngumi who is the Chairman of the Respondent's Board of Directors is bereft of the power to terminate the Petitioner's

employment and he acted in abuse of office by usurping the powers of the Respondent's Managing Director and Human Resource Manager;

e) The Respondent's Board of Directors acted and conducted itself in a manner actuated by malice and personal vendetta that is inimical to proper conduct of a public office by denying the Petitioner the right to appeal as the appellate body exercised original jurisdiction;

f) The Respondent's actions as exhibited in its correspondence with the Petitioner confirms that there was never any intention to subject the Petitioner to due process;

g) The Respondent acted maliciously and capriciously in making the impugned decision to terminate the Petitioner's employment and therefore violated the Petitioner's inalienable right by condemning her unheard and based on unknown allegations and personal vendetta;

h) The Respondent acted towards the Petitioner in a manner that was manifestly irresponsible and inimical to good governance and leadership by not only being opaque by creating an impression that there were some clear and documented complaints against the Petitioner and that a fair hearing had been conducted;

i) The Petitioner's rights under Articles 41, 47, 50 and 135 of the Constitution were violated;

j) The action by the Respondent is not *bona fide*, smacks of malice, bias, is oppressive and discriminatory against the Petitioner;

k) The unlawful and unprocedural termination of the Petitioner's employment had occasioned irreparable injury and damage to her;

l) The Respondent would not suffer any prejudice if the orders sought are granted;

m) The Petitioner has established a prima facie case and it is in the interest of justice that the said orders are granted.

3. In her supporting affidavit sworn on 25th October 2016, the Petitioner depones that she had a good employment record with the Respondent where she had risen through the ranks to the position of Company Secretary and had twice acted as Managing Director.

4. On 21st December 2015, the Petitioner applied for annual leave which was granted. She extended her leave by 20 days to attend to family matters.

5. It was while on leave that she received a letter from the Chairman of the Respondent's Board asking her to take leave pending further direction by the Board. Thereafter, the Chairman wrote a series of letters to the Petitioner alleging negligence of duty amounting to gross misconduct. The Petitioner submitted a detailed response to these allegations.

6. By letter dated 16th May 2016 the Petitioner was invited to a personal hearing before the Human Resource Board Committee. Thereafter her employment was terminated on the ground that her response to the allegations levelled against her was unacceptable.

7. The Petitioner states that she was not afforded an opportunity to be heard as the Respondent failed to supply her with her accusers' statements. She alleges malice and bad faith on the part of the Respondent's Board of Directors. The Petitioner further states that the Respondent did not conduct any investigations into the allegations levelled against her. She also challenges the composition of the Disciplinary Committee that conducted her personal hearing.

8. Overall, the Petitioner claims that in handling her case, the Respondent violated the law and its own Staff Rules and Regulations.

9. In a replying affidavit sworn by the Respondent's Managing Director, Joe Sang on 10th November 2016 it is deponed that in a Special Board Meeting held on 17th December 2015 and continued on 27th January 2016, while carrying out a rapid review of the Respondent's performance, the Board expressed dissatisfaction with the performance levels under the Petitioner's reign as Acting Managing Director and her inability to implement the strategy set by the Board.

10. By letter dated 13th April 2016, the Respondent notified the Petitioner of the observations by the Board. The Petitioner was required to submit a written explanation giving reasons why disciplinary action should not be taken against her.

11. The Petitioner responded by her letter dated 25th April 2016 and on 16th May 2016 the Respondent wrote to her inviting her to a disciplinary hearing before the Staff Disciplinary Committee on 23rd May 2016, where she made representations.

12. After taking the Petitioner's representations into consideration, the Staff Disciplinary Committee found her explanation unsatisfactory and made a recommendation that the Petitioner be summarily dismissed. This recommendation was adopted by the Human Resource Board Committee and approved by the full Board on 30th May 2016. The Petitioner's employment was terminated on 5th August 2016.

13. It is the Respondent's case that the decision to terminate the Petitioner's employment was lawful and in the interest of the public. The Respondent states that to stay the Petitioner's termination would in effect reverse and/or annul the Respondent's decision. It is the Respondent's position that the prayer for reinstatement is in the nature of a final order which cannot be granted at the interlocutory stage.

14. Moreover, it would not be in the public interest to halt recruitment of a Company Secretary for the Respondent which is a strategic government agency. At any rate, the Petitioner's employment having been already terminated, an order for stay would have the effect of reviving a non-existent contractual relationship.

15. The issue for determination in this application is whether the Petitioner has made out a case for grant of the interlocutory orders sought. The Petitioner seeks stay of her termination, an order restraining the Respondent from recruiting for the position of Company Secretary as well as her reinstatement to the position she held prior to her termination.

16. Taken together, the Petitioner's prayers in this application are in the nature of mandatory and prohibitive injunctive orders. The conditions for granting of such orders were well stated in the famous case of ***Giella v Cassman Brown & Company Limited [1973] EA*** as follows:

- a) An applicant must show a *prima facie* case with a probability of success;
- b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;
- c) If the Court is in doubt, it will decide the application on the balance of convenience.

17. The question before the Court is whether the Petitioner's application satisfies the conditions set out in ***Giella v Cassman Brown*** (supra). It was submitted on behalf of the Respondent that the orders sought are final in nature and cannot be granted at the interlocutory stage.

18. In advancing this line, Counsel for the Respondent relied on the decision in ***Gladys Boss Shollei v Judicial Service Commission [2013] eKLR*** where **Nduma J** citing an earlier decision in ***Alfred Nyungu Kimungui v Bomas of Kenya (Cause No 620 of 2013)*** held that reinstatement is a substantive remedy that should normally issue after a full hearing.

19. This is the law as I understand it. Once a termination of employment has occurred, the Court will not

ordinarily issue an interlocutory order, whether it be called a stay of termination or an outright reinstatement, whose effect is to reverse the termination. The only exception would be where a termination is effected in defiance of a subsisting court order (see *Evans Mumo Mwangangi v Kitui County Public Service Board & another [2016] eKLR*).

20. Regarding, the prayer for an order barring the filling of the position previously held by the Petitioner, the Court was referred to the decision by **Nzioki Wa Makau J** in *Tom Otieno Odongo v Cabinet Secretary Ministry of Labour Social Security & Services & National Social Security Fund Board of Trustees (Cause No 1174 of 2013)* where in declining to grant a similar order, the Judge stated that it would not be in the public interest to halt the recruitment process as the National Social Security Fund was expected to continue running efficiently even as the Claimant's case against it progressed. **Nduma J** reached a similar conclusion in the *Gladys Boss Shollei Case* (supra).

21. I agree with the foregoing decisions and add that the right of an employee in the public service must always be balanced against the public interest. In this regard and applying the final test in *Giella v Cassman Brown*, the Court finds that the balance of convenience tilts in favour of the Respondent.

22. Ultimately, the Petitioner's application is declined. The costs of the application will be in the Petition.

23. The interim orders granted on 26th October 2016 are vacated.

24. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF JANUARY 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Okweh Achiando for the Petitioner

Miss Nyagah for the Respondent