



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 2618 OF 2016**

**PROF. STANLEY OMINDE KHAINGA (suing as the Chairman  
of Kenya Society of Plastic  
and Reconstructive Surgeons).....CLAIMANT**

**VERSUS**

**THE AGA KHAN UNIVERSITY HOSPITAL.....RESPONDENT**

**RULING**

1. This Claimant's application brought by Notice of Motion dated 22<sup>nd</sup> December 2016 seeks orders restraining the Respondent from recruiting one Radovan Boca, a Consultant Plastic Surgeon or any other plastic surgeon and directing them to conduct the recruitment for the position in a fair and transparent manner.

2. The application is supported by the affidavit of Prof. Stanley Ominde Khainga and is based on the following grounds:

- a) That the Respondent is in the process of sourcing the services of a Plastic and Reconstructive Surgeon without advertising the said position;
- b) That the Claimant Society has members who are qualified for the position but they have been denied the opportunity to apply;
- c) That the Respondent has initiated the recruitment of the said Radovan Boca who is not known to members of the Claimant Society;
- d) That the said position of Plastic and Reconstructive Surgeon can be filled locally by members of the Claimant Society;
- e) That the intended appointee to the position is a foreigner with no extra-ordinary qualifications;
- f) That the employment of the said Dr. Radovan Boca offends the provisions of the Employment Act which prohibit discrimination;
- g) That it is in the interest of justice that the orders sought are granted.

3. The Respondent's response is contained in a replying affidavit sworn by its Chief of Staff, Dr. Majid

Twahir on 11<sup>th</sup> January 2017. He states that the Court has no jurisdiction to entertain these proceedings as there is no valid claim within the terms of Article 162(2)(a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act.

4. Dr. Twahir further states that the Kenya Society of Plastic and Reconstructive Surgeons, a voluntary association registered under the Societies Act, has no legal authority to regulate the manner in which a private hospital such as the Respondent recruits its staff.

5. Regarding the recruitment, Dr. Twahir depones that the Respondent placed an advertisement in the Daily Nation Edition of 20<sup>th</sup> July 2012 inviting applications from qualified individuals for several positions including a full time faculty member for Plastic and Reconstructive Surgery. The advertisement was also posted on the Respondent's website.

6. Only two individuals applied for the position; Dr. Ashraf and Dr. Radovan. Both were interviewed and by letter dated 8<sup>th</sup> September 2014, Dr. Radovan was offered the position. He reported to work on 17<sup>th</sup> August 2015 but left after six months in February 2016, with the aim of coming back. It is further deponed that during his six months' stint at the Hospital, Dr. Radovan's performance was outstanding.

7. My understanding of the Claimant's complaint in this application is that the Respondent has opted to employ a foreigner to occupy a position that could be filled by its members. In response, the Respondent gives a detailed account of a previous employment relationship with Dr. Radovan whose performance was rated as outstanding.

8. There are many lawful ways of sourcing employees including; open or restricted advertisement, selection or head hunting. A recruitment process will not be termed as unfair merely because a public advertisement has not been made.

9. For high level professional and technical positions, an employer may justify a restricted selection mode as long as there is no discrimination against a particular candidate or group of candidates. The Claimant has not provided any particulars to support its general allegations of discrimination. The person selected has previously occupied the position and is therefore tested.

10. The Court finds nothing wrong with this approach. The Claimant's application is therefore without merit and is dismissed with costs to the Respondent.

11. It is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST DAY OF JULY 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Nyangito for the Claimant

Mr. Amoko for the Respondent