



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE 434 OF 2016

JOHN NDIRITU NGUYO.....CLAIMANT

VERSUS

KENYA PORTS AUTHORITY1ST RESPONDENT

WILLIAM KIPKEMBOI RUTO..... 2ND RESPONDENT

RULING

Introduction

1. The Claimant brought has brought the notices of Motion dated 6.6.2016 seeking, the following orders:-
 - a. Injunction to restrain the 1st Respondent from allowing the 2nd Respondent to assume and/or take over office so as to perform the duties of Head of Marine Operations (HMO) Grade HE2 pursuant to the appointment made on 17.5.2016 by the 1st Respondent's Board, pending the hearing and determination of this Suit.
 - b. The Claimant be allowed to continue discharging the duties of Ag. HMO grade HE2 in the 1st Respondent until the court order otherwise. The Motion is brought under rule 16(3) of the Employment and Labour Relations Court Rules (ELRCRs), Article 159 of the Constitution of Kenya and all other enabling provisions of the Law. It is supported by the affidavits sworn by the Claimant on 6.6.2016 and 9.6.2016.
2. The gist of the Motion is that he was appointed as the HMO in acting capacity on 4.3.2015 which office he continuous to occupy up to now. That under section B12(g) and (h) of the 1st Respondent, HR Manual 2011, an employee who acts in higher vacant office for up to 6 months satisfactorily is entitled to be confirmed to the respective Post. That in 5.1.2016, the General Manager Operations recommended for the confirmation of the Claimant as the HMO due to his diligent and satisfactory performance of his duties. That in violation of section B12 (g) of the KPA Manual 2011 and the common tradition and custom of succession by seniority, the 1st Respondent appointed the 2nd Respondent to the Post of HMO with effect from 17.5.2016. That notwithstanding the said appointment, the Claimant is still occupying the office of the HMO and is still discharging the duties of the HMO in acting capacity and he has not yet received any official communication from the 1st Respondent telling him to hand over as provided by section B12(o) of the KPA Manual.

3. The Motion is opposed by the Respondents through the Replying affidavits sworn by Boas Ouko and the 2nd Respondent. The gist of replying affidavits is that the appointment of the 2nd Respondent to the post of HMO was lawful and took effect from 17.5.2016 and as such the orders sought by the Motion one already overtaken by events. That the provisions of section B12 (g) and (h) of the KPA Manual 2011 were amended by the KPA Board and communicated by the 1st Respondents' Circular dated 9.6.2014. That the 1st Respondent decided not to confirm the Claimant as recommended by his immediate boss and went for competitive recruitment of which the Claimant subjected himself there to voluntarily. That after the appointment, the 2nd Respondent took over the Office and duties of the HMO.
4. The Motion was argued on 9.6.2016 by Miss Murage and Mrs. Ikegu learned Counsel for the Claimant and the Respondents respectively.

Analysis and Determination

5. After carefully considering the pleadings, motion and the rival affidavit and Submissions, there is no dispute that the Claimant was appointed to the Post of HMO in acting capacity on 5.3.2015 and has since not received any formal communication from the 1st Respondent advising him to stop acting as such. There is also no dispute that the Post of the HMO was advertised and the Claimant was among the candidates who applied for the same and was interviewed on 17.5.2016. That the 2nd Respondent was appointed to the Post of HMO with effect from 17.5.2016 and he accepted the appointment as offered. The issue for determination therefore is whether the applicant has met the threshold for the grant of interlocutory injunction which include proof of a prima facie case with probability of success, proof of an irreparable harm if the order is denied and/or that the balance of convenience favours the applicant.

Prima Facie Case

6. Miss Murage Advocate submitted that the applicant has established a prima facie case with probability of success by showing that the removal from office as Ag. HMO is irregular and there is breach of section B12 (g), (h) and (o) of the KPA HR Manual 2011. That the removal from the office is in violation of Article 10 and 47 of the constitution of Kenya which entitles him to face administrative action. She relied on the persuasive decision in **Industrial Court Cause No. 240 of 2014 Maurice Milimu Amalwa Vs. Kenya Ports Authority [2014] eKLR** where Radido J. gave interlocutory injunction in a similar case to the present Case.
7. Mrs. Ikegu advocate for the Respondents has however submitted that no prima facie case has been proved by the applicant that the prayers sought have already been spent because the 2nd Respondent has since been formally appointed and filled the vacancy of the HMO. That the appointment was fair and above board because the recruitment was through a competitive process and in accordance with the KPA Act. That the Claimant applied for the job and was interviewed but he 2nd Respondent emerged the best candidate for the position and was appointed effective 17.5.2016. That the 1st Respondent acted fairly by appointing the best candidate. Consequently, according to the Counsel, the appointment of the 2nd Respondent was regular and as such the Claimant has not established any prima facie case with probability of success.
8. The Claimant's case is anchored on section B12 (g), (h) and (o) of the KPA HR Manual 2011. There is no dispute that section B12 (g), was amended by the KPA Board in its 302nd regular meeting held on 23.5.2014. In this Court's view, however, the said amendment merely strengthened the right of an officer serving in acting capacity to get automatic confirmation under section b12 (h) of the Manual after acting for 6 months. The new sub section (g) reads:-

“Acting appointments will be limited to six (6) months at any given time.”

The foregoing amendment was a departure from the former sub section (g) which required that a decision had to be made either to confirm the acting officer to the Post or revert him to his

former Post.

9. Section B12 (h) on the other hand was harmonized with subsection (g) by the amendment such that confirmation is now mandatory after serving for 6 months provided that monthly evaluation reports from the Head of Department are satisfactory. It provides that:-

“(h) An employee who has acted for six consecutive months in a vacant Post shall, subject to satisfactory monthly reports from the Head of Department, be confirmed to the respective Post.”

10. In this Court's view, the Claimant had become entitled to an automatic confirmation provided his Head of Department had prepared his monthly report showing that the Claimant had satisfactorily performed in that post. The Claimant has produced a letter dated 5.1.2016 by General Manager Operations recommending the confirmation of the Claimant to the post of HMO because in his opinion the Claimant had discharged his duties diligently and professionally to his satisfaction. No monthly reports were enclosed or referred. The recommendation was not accepted and the vacancy was advertised for competitive recruitment. The Claimant did nothing to stop the exercise at that time. Instead he sanitized it by subjecting himself to the process by applying for the vacancy and participating in the interviews. It is only after losing the vacancy to the 2nd Respondent, that the Claimant moved to this court.
11. The Court finds that although the Claimant was entitled to the post of HMO, he waived that right by subjecting himself to the competitive recruitment exercise which opened the chance for other and better candidates to be appointed. This Suit should have been filed before the exercise of recruiting the HMO started or before the successful candidate was appointed. He however waited until he learned that the 2nd Respondent had been duly appointed to fill the vacancy and then sought injunction to stop the substantive HMO from taking over the office and from discharging the lawful duties of the HMO.
12. This Court's view is that although failure to confirm the Claimant under section B12 (g) & (h) of the KPA HR Manual 2011 was irregular and amounting to breach of contract, nevertheless, the court finds the said irregularity was condoned by the Claimant. The vacancy has now been filled by the 2nd Respondent and the Court cannot bar him from doing his lawful duties as the HMO. For that reason the Court finds that no prima facie case with probability of success has been established.

Irreparable Harm/Balance of Convenience

13. In any event, if the Suit succeeds after trial, damages can sufficiently compensate him. In view of the finding above that the applicant has not proved any prima facie case with probability of success, the court does not see the need to deal with the issue of irreparable harm to him if injunction is declined. Likewise, the court will not consider the issue of balance of convenience because it is not in any doubt as regards who should be rightfully serving as the substantive HMO from 17.5.2016.

Disposition

14. The notice of Motion dated 6.6.2016 is dismissed. Costs in the Cause.

Signed, Dated and Delivered at Mombasa this 17th day of June 2016.

ONESMUS MAKAU

JUDGE