



**REPUBLIC OF KENYA**

**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 81 OF 2016**

***(Before D. K. N. Marete)***

**LUCY KERUBO.....CLAIMANT**

**VERSUS**

**THE CHAIRMAN FINMAX COMMUNITY BASED.....1ST RESPONDENT**

**KIMUTAI YEGON.....2ND RESPONDENT**

**MERESA ACHIENG.....3RD RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Claim dated 13th April, 2016. It does not disclose an issue in dispute on its face.

The respondent in a Reply to Memorandum of Claim dated 31st May, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on or about the 5th August, 2015, he received a transfer letter from the 2nd and 3rd respondents to transfer to the laundry department at FFI from Hilverda Cre`che but was not confirmed as a full supervisor. His case is that this was biased because some of his colleagues who had also been transferred complained and were returned to Hilverda Cre`ches. Again, no explanation was made for non confirmation to full supervisor yet the letter said this could be done in three months.

The claimant's further case is that this transfer has interrupted her education at High Tech College while this was known to the respondent and she was disabled to do her exams and altered classes in December, 2015. No explanation has been made from not being a supervisor has been made despite numerous requests. She has also suffered loss as follows;

- a) Receipt dated 5th March, 2013: Kshs. 22,000/=
- b) Receipt dated 9th May, 2013; Kshs. 18,000/=
- c) Receipt dated 17th September, 2013; Kshs. 24,300/=
- d) Receipt dated 7th November, 2013; Kshs. 18,500/=

**TOTAL Kshs. 82,800/=**

She prays as follows;

- a) *Confirmation of the Claimant as a Grade 3 Supervisor and her transfer back to Hilverda Creche.*
- b) *General and Special damages.*
- c) *Cost of the suit.*
- d) *Interest on (a) & (b) above at court's rate.*

The respondent's case is that the claimant's transfer to the laundry department was necessitated by a staff rationalization exercise aimed at ensuing optimum deployment of her staff. The claimant was not confirmed as supervisor as this was a temporary appointment as an acting supervisor in place of Jane Kanus who was later reinstated and she (claimant) was always aware of this.

The respondent denies all claims of frustration of the claimant's education opportunities and even damages and avers as follows;

- i. *The claimant's contract of employment clearly stated that the claimant could be deployed to work anywhere within the Republic of Kenya.*
- ii. *The claimant never notified the respondents that she was attending classes and in fact never sought any study leave to attend classes or do exams.*
- iii. *The claimant's request for transfer back to Hilverda Cre`ches was not backed up by any compelling reasons. As a matter of fact the claimant had even cited eye complications which were established to be unfounded upon medical examination. See annexure FCBG 3.*

The matter came to court severally until the 23rd June, 2016 when it was agreed

on a disposal by way of written submissions.

The issues for determination are;

1. Whether the claimant should be confirmed as a Grade 3 supervisor?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this cause?

The 1st issue for determination is whether the claimant should be confirmed as a Grade 3 supervisor. The parties hold opposing positions on this one. The claimant in her written submissions reiterates and reaffirms her case of entitlement to promotion as pleaded. It is her case that the denial of promotion was biased and unwarranted and also that the transfer disrupted her education prospects in college. She relies on the authority of Article 27 and 41 of the Constitution of Kenya, 2010 as follows;

- (1) *'Every person is equal before the law and has the right to equal protection and equal benefit of the law.'*
- (2) *'Equality includes the full and equal enjoyment of all rights and fundamental freedoms.'*
- (4) *'The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age,*

disability, religion, conscience, belief, culture, dress, language or birth.

## 2. Labour Relations

The Constitution of Kenya 2010 recognizes fair labour practices and in Article 41 states;

- i. Every person has the right to fair labour practices.

It is her submission that the right to appoint and promote employees is within the employer's prerogative but this should be exercised fairly and equitably.

The respondent's in their written submissions also reiterates their case of faithful treatment of the claimant. They deny frustration and discrimination of the claimant or even denial of opportunity to attend classes by herself. The respondents seek to rely on the authority of **Max Masoud & Another v Sky Aero Limited [2015] eKLR** where the court observed;

*...When there is a claim that a claimant has been discriminated against, effort must be put in giving evidence in this regard. So serious is such an allegation that where cited, the court must look at the intricacies at the work place to ensure that such an unconstitutional practice is not taking place within the private and public spheres of life and where this relates to a work environment... Therefore a party who claims that they have been discriminated against must outline the circumstances for such a claim and clearly make a distinction as to how those circumstances as contradistinguished create a scenario for discrimination.*

Further, the respondent denies a case for promotion in that this was not due and the claimant was always aware of the position as expressed in her letter of appointment dated 13th April 2016 which was equivocal in all aspects. She again seeks to rely on the authority of **Henry Ochido v NGO Coordination Board [2015] eKLR** where it was observed;

*...I find no legitimate claim by the Petitioner over the same position. The officer appointed for this position was in existence and known to the Petitioner but based in the regional office, Kisumu. **The Petitioner was only in acting capacity and despite being in such a position for 3 months, he remained on a substantively different position as he was never confirmed on this position. It cannot therefore be a justification that such a position should have been confirmed and the Petitioner retained in the same.** Even where there was no substantive holder for the position of Deputy Executive Director, the procedures set out by the employer for the appointment of the position would still have come to play. The Petitioner cannot therefore claim any entitlement over this position.*

The claimant has not in any way demonstrated a case of discrimination, frustration or even being exposed to a situation of hardship as pleaded in her claim. The respondent in opposition and denial of the claim comes out clearly and sets out a case of a work environment where the parties went out to perform their duties as per the terms and conditions of employment. I therefore find that the claimant is not entitled to confirmation as Grade 3 supervisor or at all and hold as such.

The claimant having lost on the 1st issue for determination above is not entitled to the relief sought. And this answers the 2nd issue for determination. I am therefore inclined to dismiss this claim with costs to the respondents. And this clears all the issues for determination.

Delivered, dated and signed this 19th day of July 2016.

**D.K.Njagi Marete**

**JUDGE**

## Appearances

1. Mr. Mutai instructed by Chelule & Company Advocates for the claimant.
2. Mr. Muita instructed by Bett & Company Advocates for the respondent.