



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 349 OF 2016

SARAH ACHIENG BONDI

CLAIMANT

v

MUSIC COPYRIGHT SOCIETY OF KENYA

RESPONDENT

RULING

1. Through a motion dated 14 September 2016, Sarah Achieng Bondi (Claimant) seeks

1. (*spent*)

2. ... (*spent*)

3. *THAT pending the hearing and determination of the Claimant's suit an interlocutory mandatory injunction do issue compelling the Respondent to reinstate the Claimant's/Applicant's salary benefits and other entitlement accrued from 05.08.16 when she was unfairly and unlawfully terminated.*

4. ... (*spent*)

5. *THAT pending the hearing and determination of the Claimant's claim herein, an interim injunction do issue restraining the Respondent, either by themselves, assigns or any person claiming through them, from advertising or conducting any activity directed towards or with the intention of substantively filling the position of Regional Manager, Rift Valley or its equivalent of the Respondent or in any manner howsoever substantively filling the said position.*

6. *THAT the Respondent bears the costs of this Application.*

2. On 14 September 2016, the Court directed that the motion be served upon the Respondent for *inter partes* hearing on 28 September 2016 (Court erroneously indicated date as 28 October 2016, and when this was brought to its attention on 28 September 2016, it rectified the error by directing service of a hearing notice for 10 October 2016).

3. When the motion was called out for hearing on 10 October 2016, the Respondent sought for more time to respond to the application, but the Court declined to grant an adjournment because the motion had been served 2 weeks earlier, and therefore it had more than sufficient time to respond.

4. The motion was therefore urged and the Respondent made submissions on points of law.

5. The Court has given due consideration to the material placed before it and the oral submissions made in

Court.

6. Order 3 as proposed by the Claimant seeks not only a *mandatory order* but an order whose effect would be to reinstate her to a position she was dismissed from on 5 August 2016.

7. Mandatory injunctions are given in very exceptional circumstances, while reinstatement in employment law is generally a final remedy, though there are exceptions especially where the employment is protected and/or underpinned by specific as opposed to general statutory law.

8. The employment relationship between the parties herein was regulated by contract and general employment law, and in effect, the Court is unable to accede to the Claimant's application to grant an order whose effect would be to restore the employment relationship without a hearing on the merits.

9. By declining to grant the proposed order 3 at this stage, the Court is not suggesting that the Court would be hindered from ordering reinstatement or re-engagement in terms of section 49 of the Employment Act, 2007, after a hearing of the Cause on the merits.

10. Under the proposed order 5, the Claimant seeks to stop the Respondent from recruiting a person to replace her on a substantive basis pending the determination of the Cause.

11. The logic of such a course is obvious in that such replacement may render an order of reinstatement or re-engagement superfluous were the Court to find that the termination of employment was unfair.

12. But there is a converse to that logic, and it is that were the Court to find the Claimant's termination of employment fair, the Respondent would have been denied the opportunity to engage a person with the right qualifications, skills and experience for the job.

13. In balancing the rival interests, the Court is alert to the legal position that it may order re-engagement on a job with similar requirements and benefits as obtained before separation. Or compensation may be ordered.

14. The Court in consideration of the above comes to the conclusion that the orders sought are not merited at this interlocutory stage and the parties ought to await the hearing of the Cause on the merits, on a priority basis.

15. The motion dated 14 September 2016 is thus dismissed with costs in the Cause.

16. The Court will immediately hereafter give directions as to filing of necessary process with a view to achieving a hearing on an accelerated basis.

Delivered, dated and signed in Nakuru on this 18th day of November 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ouma instructed by Ouma Njoga & Co. Advocates

For Respondent Ms. Wachira instructed by Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Nixon/Daisy