



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1984 OF 2013

BETWEEN

JOAB MEHTA OUDIA.....CLAIMANT

VERSUS

COFFEE DEVELOPMENT BOARD OF TRUSTEES.....RESPONDENT

RULING

1. The Claimant filed the Statement of Claim on 10th December 2013, seeking orders against the Respondent for a declaration that termination of his contract of employment on 4th November 2013 was unfair; a declaration that the Respondent violated the Employment Act 2007; compelling the Respondent to pay him compensation for discrimination; an alternative order for reinstatement; general damages; 12 months' salary in compensation; mesne profits; terminal benefits; and costs with interest.
2. Contemporaneously, the Claimant presented an Application for the following provisional measures:-
 - a. Pending the hearing and determination of the Application, the Honourable Court be pleased to grant an interim order to stay the termination of the Claimant/ Applicant's employment;
 - b. Pending hearing and determination of the Claim, the Honourable Court be pleased to grant interim order to stay the termination of the Claimant's/ Applicant's employment;
 - c. Pending hearing and determination of the Application, the Honourable Court be pleased to grant the an Order to compel the Respondent to unconditionally reinstate the Claimant/ Applicant to the position of Procurement Assistant with full powers, salary and all benefits and rights thereof;
 - d. Pending hearing and determination of the Claim, the Honourable Court be pleased to grant an order to compel the Respondent to unconditionally reinstate the Claimant/ Applicant to the position of Procurement Assistant with full powers, salary and all benefits and rights thereof;
 - e. Pending hearing and determination of the Application or until further orders of the Court, the Honourable Court be pleased to grant interim order to prohibit the Respondent from advertising for the position of or recruiting or hiring another Procurement Officer to take the functions of the Claimant/Applicant;
 - f. Pending hearing and determination of the Claim or until the further orders of the Court, the Honourable Court be pleased to prohibit the Respondent from advertising for the position of or recruiting or hiring another Procurement Officer to take over the functions of the Claimant/ Applicant;

- g. Pending the hearing and determination of the Application, the Court be pleased to grant an order to stay the appointment of Bernard Atonga as the Acting Procurement Manager or from taking over the functions and responsibilities of the Claimant/ Applicant;
- h. Pending hearing and determination of the Claim, the Honourable Court be pleased to grant an order to stay the appointment of Bernard Atonga or any other person as the Acting Procurement Manager or from taking over the functions and responsibilities of the Claimant / Applicant

3. The Respondent filed a Replying Affidavit sworn by Bernard Atonga on 19th December 2013, and filed a Statement of Reply to the Claim on 21st January 2014. The Respondent's position is that the Claimant was on probation at the time of termination on 4th November 2013. Termination was lawful and in accordance with the contract.

4. Parties agreed to have the Application disposed of by way of written submissions. These were placed on the record, and on 10th January 2014, the Advocates for the respective Parties gave essential details of the submissions.

The Court Finds and Orders:-

5. There is prima facie evidence shown by the Respondent that the Claimant was under probation on the day of termination. He was employed on 13th December 2012. He was placed under probation of 6 months, which lapsed in July 2013. This was extended by 3 months, in August 2013. There is *prima facie* evidence that the Claimant was under probation at the time of termination. The preliminary view of the Court is that section 42 [1] of the Employment Act 2007 applied to him, and he would not be entitled to the procedural guarantees he claims have been infringed.

6. Even if the Claimant was not under probation, it would be premature for the Court to have a position on whether the Respondent had substantive justification in terminating the Claimant's contract of employment and whether this was done in accordance with fair procedure. The law on termination requires the employer to show valid reasons or reasons, and demonstrate fairness of procedure. At the time the Application was argued, the Respondent had not even had a chance of responding to the Claim. It was extremely difficult for the Respondent to bring material within a short period of time, showing there is *prima facie* case justifying termination. The Court must weigh the position of the employer carefully at the interlocutory stage, because ultimately, it is the employer, not the employee who carries the greater responsibility in establishing whether there was a fair termination or not. In this case, the Respondent has shown a *prima facie* case that termination was under Section 42 of the Employment Act 2007. This preliminary view can be altered after hearing the Parties in full.

7. The Court reiterates its findings in the rulings cited by the Respondent ***in Industrial Court Cause Number 620 of 2013 between Alfred Nyungu Kimungui v the Bomas of Kenya and Cause Number 1200 of 2012 between Professor Gitile Naitule v. University Council Multimedia University College and Another***. Reinstatement of an employee is ordinarily a substantive remedy, to be given after the full hearing of the Parties. Instead of seeking interim reinstatement, the Claimant should seek to be heard in full, utilizing the accelerated hearing procedure that is available at the Industrial Court.

8. To grant the orders sought would mean the Court has entered the employment place, exercising the management prerogative on behalf of the employer. The Court cannot stay termination of the employer's decision. It would amount to the Court unduly interfering with a decision already made by the Management within its discretion. It is likewise not proper that the Court bars the Respondent from recruiting to fill a vacant position, either permanently or provisionally. The Respondent is presumed to know that in doing so, there is the possibility that the Court may issue the Claimant the prayers sought in the Claim, including the prayer for reinstatement. Courts have ruled that a rush to filling of a position that has fallen vacant upon dismissal of that position's holder, does not render the remedy of reinstatement impracticable. It is always advisable that the employer has a contingency arrangement, in case such an order issues, particularly in jobs that are of a singular nature at the workplace. There is no justification for interim reinstatement, stay of termination or orders barring the Respondent from proceeding to fill the

position that was held by the Claimant. The law presumes that the wronged employee would be in a position to move the Court expeditiously on the merit, and if deserving, have the substantive orders of reinstatement or re-engagement. Nothing is lost to the Claimant as the law allows him to receive back wages in addition to these remedies.

9. The law does not intend that the Court offends the rights of one employee, in seeking to protect the rights of another employee. The Court would be judging Bernard Atonga without the benefit of hearing him, by issuing an order that his appointment as the Procurement Officer is stayed. This employee has rights under the Employment Act and the Constitution of Kenya which the Court may be faulted for abridging, by reversing his employment by the Respondent as the Acting Procurement Officer, without as much as giving him the benefit to defend his accrued rights as the Acting Procurement Officer. There are no strong circumstances that would persuade this Court to depart from its earlier position on the subject. The decisions of my fellow Judges of the Industrial Court presented by the Claimant to support his position were unfortunately presented out of their contexts. In the Judgment of my sister Justice Mbaru in ***Cause Number 1491 of 2011 between Jane Frances Ominde Munyakoh v. Imaging Solutions Limited***, the Parties were heard in full, unlike in the present cause, before the Court demarcated their respective rights and obligations in its final determination. In the ruling of my brother Justice Byram Ongaya in ***Industrial Court Cause Number 1464 of 2012 between Engineer Stephen Gichuki v. the Kenya Ports Authority***, the Court merely stayed the decision of the employer sending an employee who was its CEO, on compulsory leave, pending the hearing of the Application *inter partes*. No termination had taken place, the CEO having been sent on compulsory leave, to allow for investigations on allegations of sleaze made against him. It was not a decision reinstating an employee in the interim, or preventing another employee already in the position provisionally, from exercising the contested role. The Claimant should endeavour to prosecute his Claim. ***The application has no merit and is disallowed with no order on the costs.***

Dated and delivered at Nairobi this 7th day of February 2014

James Rika

Judge