



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1540 OF 2012**

**IBRAHIM MOMANYI OKERI.....CLAIMANT**

**VERSUS**

**KENYA FORESTRY RESEARCH INSTITUTE.....RESPONDENT**

**RULING**

By a Notice of Motion dated 15<sup>th</sup> October, 2013 and filed in court on 18<sup>th</sup> October, 2013 the claimant seeks the following orders:-

- a. *This application be certified urgent and service of the same be dispensed with in the first instance.*
- b. *The respondent be restrained by an order of interim injunction from receiving applications for the position of Chief Internal Auditor of the respondent, from prospective applicants, as advertised, conduct interviews for the position or in any manner whatsoever recruit and/or fill the said position until hearing of this application inter-parties.*
- c. *The respondent be restrained by an order of injunction from receiving applications for the position of Chief Internal Auditor of the respondent, for prospective applicants, as advertised, conduct interviews for the position or in any manner whatsoever recruit and/or fill the said position until hearing and final determination of this suit.*
- d. *The cost of this application be provided for.*

The application is supported by the claimant's affidavit sworn on 18<sup>th</sup> October, 2013 and on the following grounds:-

- a. *The Respondent has unlawfully, illegally and unfairly failed to comply with the circular issued on 17<sup>th</sup> August, 2004 by the permanent Secretary/Directorate of Personnel Management, office of the President, which effectively promoted the claimant to the position of the Chief Internal Auditor of the Respondent, with effect from 1<sup>st</sup> July, 2004.*
- b. *The respondent has advertised for recruitment for the position of the Chief Internal Auditor of the respondent in the local dailies, and applications, according to the advertisement close on 27<sup>th</sup> September 2013.*
- c. *In view of the circular of 17<sup>th</sup> August 2004 aforesaid, the position of Chief Internal Auditor should be currently occupied by the claimant had the respondent effected the circular it is not vacant and the advertisement is illegal, unlawful, unjustified and injurious to the claimant.*
- d. *Filing in the position as intended will amount to a demotion of the claimant, which would be unconstitutional.*

On 5<sup>th</sup> November 2013 the Respondent filed both a preliminary objection and grounds of opposition as

follows:-

1. ***The entire application dated 15<sup>th</sup> October, 2013 has been filed res-judicata the substance of the application having been heard and determined vide a ruling on the 14<sup>th</sup> March 2013 dismissing the Claimant's application.***

The application came up for hearing inter-parties on 15<sup>th</sup> November, 2013 when the parties argued the preliminary objection. Mr. Kamau represented the claimant while Ms. Nyika appeared for the Respondent.

Miss. Nyika submitted that the claimant's application is res-judicata as a similar application filed by the claimant earlier had been heard and determined by the court on 14<sup>th</sup> March, 2013. She urged the court to dismiss the application.

Mr. Kamau on behalf of the respondent submitted that the application before court is different from the earlier application which was dated 3<sup>rd</sup> September, 2012 and was determined by the court on 14<sup>th</sup> March, 2013. The present application is seeking to restrain the Respondent from advertising and filling the post of Chief Internal Auditor pursuant to notice issued in the Daily Nation of 27<sup>th</sup> September 2013, that interim orders have been granted in this application and the dismissal of the earlier application on 14<sup>th</sup> March 2013 does not stop the applicant from filing the present application. He submitted that the applicant will be in a position to provide sufficient evidence in support of the application unlike in the previous application, and that the applicant merits the orders. He urged the court to dismiss the preliminary objection and allow the application to proceed inter-parties.

I have read the applicant's application dated 15<sup>th</sup> October, 2013 and compared it with the earlier application dated 3<sup>rd</sup> September, 2012. The prayers in the two applications are substantially the same. The reasons why the application was dismissed are in the ruling as follows:-

***“The Claimants case is that he is entitled to be confirmed to the position of chief Internal Auditor of the Respondent by virtue of a circular dated 17<sup>th</sup> August, 2004. The said circular was addressed to the Permanent Secretary, Ministry of Finance, Nairobi. It is copied to the Secretary, Public Service Commission. The Claimant has not explained how a circular addressed to the Permanent Secretary, Ministry of Finance should be binding on the Respondent.***

***Another issue that has not been explained is why the Claimant is seeking implementation of a circular dated 17<sup>th</sup> August, 2004 in a case filed on 31<sup>st</sup> August, 2012, 8 years after the circular was issued.***

***The 3<sup>rd</sup> issue which has not been explained is why the claimant has not stated his qualifications so that the court can determine if he is really qualified for the job.***

***All these are issues that create doubt as to whether the Claimant is a prima facie case with probability of success.***

***The Claimant has also not demonstrated that if the orders sought are not granted he will suffer irreparable harm that cannot be compensated by way of damages.***

***This therefore leaves me with only one test, that of the balance of convenience. No reason has been given by the claimant why the balance of convenience should tilt in his favour. The Claimant has not demonstrated that he is entitled to conversion to the new grading structure. The circular at page 2 in paragraph 4 under the heading “conversion to the new grading structure” states as follows:-***

***“Officers who are member so the Scheme of Service for Internal Auditors will convert to the new***

***designations as follows.....” The Claimant has not shown the he was “a member of the scheme of Service for Internal Auditors at the time the circular was released”.***

I find that this application is substantially similar to the claimants application dated 3<sup>rd</sup> September, 2012 and that the ruling of this court in that application would apply to this application as well.

For the foregoing grounds I find that the application is ***res-judicata*** and dismiss the same.

Orders accordingly.

Read in open court this 5<sup>th</sup> day of March, 2014.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

Read in the presence of:

Otieno holding brief for Gichamba for Respondent

No appearance for Claimant/Applicant