



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**

**CAUSE NO. 240 OF 2014**

**MAURICE MILIMU AMAHWA CLAIMANT**

**V**

**KENYA PORTS AUTHORITY .. RESPONDENT**

**RULING**

1. The Applicant filed a Memorandum of Claim against Kenya Ports Authority on 21 May 2014 stating the issues in dispute as *failure to pay acting allowance, failure to effect confirmation to grade HE 2 after expiry of mandatory acting period and unfair labour practices*.
2. Together with the Memorandum of Claim, the Applicant filed a Motion under certificate of urgency seeking various injunctive reliefs. The motion was certified urgent and on the return date of 22 May 2014 the Court issued an order stopping the Respondent from appointing a substantive Head of Pension scheme pending *inter partes* hearing on 10 June 2014.
3. The motion proceeded to hearing on the aforesaid date and ruling was reserved to today.

***Applicant's case***

4. The Applicant stated he was relying on the grounds on the face of the motion and his supporting affidavit.
5. It is not in dispute that the Applicant was appointed to act as Head of Pension effective 12 August 2013 through a letter dated 30 August 2013. The Respondent's Human Resource Manual 2011 provide at clause B.12 (g) and (h) that acting appointments are limited to six months after which the Respondent has to make a decision either to confirm an employee in the post or revert the employee to his previous position.
6. Mrs. Nyange for the Applicant submitted that the Applicant had acted as Head of Pension for more than six months and therefore the Respondent had no option but to confirm him on or before 12 February 2014.
7. Mrs. Nyange further submitted that the Applicant's case met all the principles for grant of injunctive relief. She submitted that the Applicant had a prima facie case and that if the injunction was not granted irreparable damage would be occasioned to the Applicant.

***Respondent's case***

8. Mr. Sangoro for the Respondent, on the other hand contended that the Applicant had to prove his case fell within all the principles set out in the *Giella v Cassman Brown & Co. Ltd* case. He admitted that the Applicant had a prima facie case but submitted that no irreparable damage would be occasioned to the Applicant because he was still working and receiving remuneration. He also

- submitted that any damage could be compensated with costs.
9. He also submitted that because the advert to fill the position of Head of Pension went out on 30 August 2013, the Applicant had delayed through indolence and lack of vigilance to commence action promptly.
  10. He further submitted that because the Applicant had been shortlisted and invited to the interviews he stood a chance of getting the position.
  11. In a parting shot, he submitted that granting an order of specific performance would dispose of the Cause at the preliminary stage.

## **Analysis**

12. At this stage, the Court should not delve deeply into issues of merit. What the Court should consider is whether the Applicant has established a prima facie case with a probability of success, irreparable harm and balance of convenience. The Court should also not lose sight of the statutory provision that specific performance should not be ordered in contracts of service unless in very exceptional circumstances.
13. Most of the facts are common. Applicant was appointed in writing to act as Head of Pension. Pursuant to the Respondent's Human Resource Manual, acting appointments are limited to six months. The Manual further provides that an employee who has acted for six consecutive months in a vacant post shall be confirmed subject to satisfactory reports from the Head of Department.
14. The Applicant has acted for more than six months. On the face of the Manual, he would be entitled to confirmation to the post.
15. Whether reports from Head of Department were satisfactory or not cannot be discussed here. That belongs to the realm of main trial on the merits.
16. The Court also notes that the recruitment of a substantive head commenced soon after the appointment of the Applicant to act as Head of Pension.
17. The Court is satisfied that on the basis of the contractual terms in place between the parties, the Applicant has made out a prima facie case with a probability of success and that the terms of the Human Resource Manual make the circumstances of this case exceptional. The balance of convenience also tilts in favour of the Applicant getting injunctive relief pending an investigation of the facts.
18. The orders sought by the Applicant are far reaching and may affect parties who are not part of the proceedings herein.
19. In this regard, the order that commends itself to the Court is to order the Respondent not to appoint a substantive Head of Pension Scheme pending the determination of this Cause.
20. Because of the nature of the dispute and the reliefs sought, the Court further orders that the parties file forthwith all witness statements and any other relevant documents within the next 10 days.
21. This Cause will thereafter be mentioned on 23 July 2014 to confirm compliance and to give directions as to hearing/fixing of hearing dates on a priority basis.
22. Costs to abide the Cause.

**Delivered, dated and signed in open Court in Mombasa on this 11<sup>th</sup> day of July 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Applicant

Mrs. Nyange, instructed by Sherman Nyongesa & Co. Advocates

For Respondent

Mr. Sangoro, instructed by Muthoni Gatere Advocate

