



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 262 OF 2014

KELVIN KIGEN KIETI .....CLAIMANT

VERSUS

1. KILIFI COUNTY PUBLIC SERVICE BOARD

2. MATANO RIZIKI CHOGA .....RESPONDENTS

## **RULING**

### **INTRODUCTION**

On 12/6/14 the claimant brought the suit herein challenging the appointment of the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent as the substantive Head of Supply Chain Management Services Kilifi County. Contemporaneously, the claimant filed the Notice of Motion dated 11/6/2014 seeking to restrain the 2<sup>nd</sup> respondent from taking over the position of the Head of Supply Chain Management services pending the hearing and determination of the suit. It also seek to restrain the 1<sup>st</sup> respondent, her agents, servants, assigns and/or whomsoever from removing the claimant from the office of the Head of Supply Chain Management pending the hearing and determination of the suit.

The Motion is supported by the affidavit of the claimant sworn on 11/6/14. The respondents have opposed the Motion through the replying affidavit sworn on 17/6/2014 by Rosalia Nyale on behalf of the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent respectively.

When the Motion was heard ex parte on 12/6/2014, the court made interim order of injunction restraining the 2<sup>nd</sup> respondent from taking over the office of the head of Supply Chain Management services pending inter partes hearing of the Motion on 17/6/2014. On the 17/6/2014, the respondents sought time to reply to the Motion.

The Motion was adjourned to 24/6/2014 for hearing. In the meanwhile the interim order of junction was extended by consent.

### **APPLICANT'S CASE**

Mr. Adhoch, learned counsel for the applicant cited Section 12 of the Industrial Court Act, Cap 234, laws of Kenya as the basis for seeking conservatory orders through the Motion herein. He relied on the claimants supporting affidavit and the annexure thereto in urging the court yo grant the orders sought. In his submissions the counsel contended that the selection of the 2<sup>nd</sup> respondent was discriminatory because

according to the interviews done in October 2013, the claimant emerged as number one while the 2<sup>nd</sup> respondent was number four.

According to the claimant the appointment of the 2<sup>nd</sup> respondent was discriminatory and in contravention of Article 27 of the constitution which provides for equal protection of the law. The counsel further submitted that the appointment of the 2<sup>nd</sup> respondent was also in contravention of Article 47 of the constitution which provides for fair administrative action in the said appointment.

In addition the counsel submitted that the 2<sup>nd</sup> respondent was not qualified to hold the office as at the time of the interview for want of university degree. According to the claimant the 2<sup>nd</sup> respondent graduated in December 2013 while the interviews were done in October 2013. lastly Mr. Adhoch submitted that the appointment of the 2<sup>nd</sup> respondent was not on the merits and it violated Article 232 of the constitution. According to the counsel, Article 232 *supra*, provides that appointment in the public service shall be on merit and through competitive process.

In view of the foregoing points, the counsel contended that a prima facie case had been made out to warrant granting injunction to restrain the 2<sup>nd</sup> respondent from taking over the office in dispute pending hearing and determination of the suit. He concluded by submitting he brought the Motion without delay after learning about the appointment on 6/6/2014.

### **RESPONDENT'S CASE**

Mr. Njoroge learned counsel for the respondent opposed the Motion. He relied on the affidavit of Rasalia S. Nyale and the 2<sup>nd</sup> respondent aforesaid. He submitted that the Motion did not meet the requirements for the grant of injunction. He submitted that the applicant did not prove a prima facie case since the position of supply chain management did not exist in the 1<sup>st</sup> respondent.

According to the counsel the functions of the 1<sup>st</sup> respondent are set out under Section 59 of the County Governments Act Cap 265 Laws of Kenya, which is basically to create and abolish offices and to appoint workers for the county. The counsel explained that the 1<sup>st</sup> respondent advertised for the officer of head Supply Chain Management and conducted the interviews. According to the counsel, the pass mark was 70% of which the claimant was ranked first and the 2<sup>nd</sup> respondent fourth. He contended that despite the said ranking, the 2<sup>nd</sup> respondent was appointed after considering other criteria including youth, gender, minorities and 30% representation for the people from outside the county.

The counsel submitted that the appointment was lawful and in accordance with Article 10, 27(4) and 56 of the constitution. According to him the fact that the claimant was ranked first did not entitle him to the appointment. He maintained that the appointment of the 2<sup>nd</sup> respondent was after considering all the factors.

On the other hand, the counsel contended that the claimant was never an employee of the Kilifi County but that of the National government only seconded to the county. He denied any existence of employment relationship between the claimant and the 1<sup>st</sup> respondent and submitted that the claimant was not being dismissed but only being returned to his lawful employer the national Government. Consequently the counsel maintained that the claimant will not suffer any harm because he will continue to earn salary. In addition the counsel submitted that even if there will be any loss the same can be compensated by damaged.

Lastly the defence counsel submitted that the appointment of the 2<sup>nd</sup> respondent has already taken place and the person started to work on 3/6/2014 before the failing of the suit. Consequently he submitted that the Motion has been overtaken by events. In addition to the foregoing, the counsel contended that the claimant handed over the office on 17/6/2014 through a note annexed as exhibit DW7 to the replying affidavit.

## **REPLY BY APPLICANT**

In a brief reply, Mr. Adhoch maintained that there is a position of Supply Chain manager in the County Government. He further maintained that there was employment relationship between the claimant and the 1<sup>st</sup> respondent by referring to Annexure ICK4 to the applicants affidavit which appointed him the interim head of Supply Chain Management Kilifi County.

The counsel maintained that Article 232 and 233 of the constitution were relevant to this case. He also cited Article 41 of the constitution which provided for fair labour practices. He contended that the breach of the law though discrimination and unfair labour practice constituted a prima facie case especially because there is no explanation given on how the other criteria were applied to alter the ranking on the merit.

Lastly he submitted that irreparable harm will be occasioned by the loss of the opportunity to work in that position.

## **ANALYSIS AND DETERMINATION**

After perusing the pleadings, the Notice of Motion and the affidavit and after considering the submissions made by the learned counsel for the two sides, the only issue that arose for determination is whether the application meets the requirements for the grant of interlocutory injunction.

The requirements precedent to granting interlocutory injunction in Kenya were established by the celebrated case of **GIELLA VS CASEMAN BROWN [ 173] EA 358**, that is

1. proof of prima facie case with probability of success
2. prove of a likely irreparable harm which cannot be compensated by damages.
3. Balance of convenience.

### **Prima Facie Case**

According to Black's Law Dictionary, a prima facie case is one which raises a presumption or establishes a fact unless disproved or rebutted. The court takes that to mean that a prima facie case is one which is arguable or one which unless challenged by evidence or law by the opposing party, the court is likely to make a finding in favour of the proponent. Consequently, a prima facie case need not be one which must succeed, but rather which will succeed if not rebutted or disproved after hearing the opponent.

In addition to the foregoing, the court wishes to observe that a prima facie case would be one which relates to a breach or violation to a legal right. It is therefore necessary for the claimant to prove that the order being sought is in relation to breach or violation of his legal rights by the respondent. Consequently the court should not act on vexatious and frivolous suits.

In the present case, the claimant has alleged that he was ranked first after an interview while the 2<sup>nd</sup> respondent was fourth. The claimant was however not appointed as the Substantial Head of Supply Chaim Management for Kilifi county. Instead it is the 2<sup>nd</sup> respondent who was appointed. He believes that the appointment of the 2<sup>nd</sup> respondent instead of him was unfair and based on discrimination. He contends that the said appointment contravened Article 27, 41,47 232 and 233 of the constitution which protects him from discrimination, unfair labour practices, and unfair administrative action. He further contended that appointment to the public service is supposed to be on merits and through a competitive process. He has called upon this court to nullify the appointment of the 2<sup>nd</sup> respondent and order that the (claimant)be appointed.

He alleges that the 2<sup>nd</sup> respondent was not qualified for the job during the interview and further that the criteria other than merits used to appoint the 2<sup>nd</sup> respondent was not fair and has not been explained.

He maintained that his constitutional rights were violated when 2<sup>nd</sup> respondent was appointed. The 1<sup>st</sup> respondent has contended that she does not have the post of Supply Chain Manager in her establishment. She also contends that the fact that the claimant was ranked top on the merits did not entitle him to the appointment because that ranking was subject to other lawful criteria including “youth, gender, minorities and 30% representation of people from outside the county”. As a consequence of the foregoing the respondents submits that no prima facie case has been proved to warrant interlocutory injunction.

The court agrees with the defence that being ranked top did not necessarily entitle the claimant to the appointment before considering the other criteria cited including 'youth, gender, minorities and 30% representation of people form outside the county". Article 232(1) of the constitution provides for the values and principles of the public service which include

**“(g) subject to paragraph (h) and (i) fair competition and merits as the basis of appointment and promotions;**

**(h) representation of Kenya's diverse communities; and**

**(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of public service, of**

**(i) men and women**

**(ii) the members of all ethnic groups; and**

**(iii) persons with disabilities.”**

The foregoing provision is in line with Section 5 of the employment Act and the submissions made by the respondents to justify the appointment on the 2<sup>nd</sup> respondent and to rebut the applicants case.

The question that remains to be answered, however is whether the appointment of the 2<sup>nd</sup> respondent was unfair and in violation of the claimant's legal right. To answer that question, the court has perused the 1<sup>st</sup> respondents' exhibit RN6 which outlines the results of the interview. It does not explain how the 1<sup>st</sup> respondent arrived at the decision to appoint the 2<sup>nd</sup> respondent. There is no indication whatsoever of when that decision was made and by which method. It doesn't show that 2<sup>nd</sup> respondent was chosen because he represented a minority group but because firstly he was already serving the county as interim deputy to the current interim head, secondly, he had scored above passmark and thirdly, he was youthful. Gender and 30% representation of people from outside the county was not considered according to the Exhibit RN6 aforesaid.

In view of the foregoing observation, the court is of the considered opinion, that the appointment may not have been above board and in tune with the standards set by the constitution and the statutes. As submitted by the claimant's counsel, there is a prima facie case (arguable case) which the court should take evidence on. This does not mean that the alleged discrimination or unfair procedure must be found to be true at the end of the trial. The court is only saying that there are triable issues on an alleged breach of the law related to the appointment of the 2<sup>nd</sup> respondent as the substantive Supply Chain Manager for Kilifi county which need to be investigated by this court.

The respondent has submitted that the suit is overtaken by events because appointment has been done and that the claimant voluntarily handed over the officer on 17/6/2014. That is not true unless it was done in contempt of this court order made on 12/6/2014.

### **Irreparable Loss**

The next issue to consider is whether the claimant is likely to suffer irreparable harm. Irreparable harm is one which cannot be remedied by payment of damages.

In the present case, the applicant has contended that his opportunity to serve in the vacancy will be lost for good if the vacancy is not preserved pending the hearing and determination of the suit. In other words, his submission is that once the 2<sup>nd</sup> respondent is allowed to take over the office, the suit will be rendered nugatory as no amount damages can remedy that lost opportunity. The respondents have however contended that the claimant will suffer no loss because he will still remain employed by the national government which seconded him to the county government. According to the respondents, the claimant will not lose his salary because he is not being dismissed but only being send back to his employer, the national government.

The court has already found that a prima facie case has been proved which warrants further investigations. It follows therefore that there is need to preserve the substratum of the case which if destroyed the suit will only become moot. The reason for this view is that once the 2<sup>nd</sup> respondent is allowed to take over the office of Head of Supply Chain Management Services for the Kilifi County, the claimant may not have anything else to pursue in this matter. He will have lost the opportunity to serve the county for good. This court does not agree with the defence that such loss of opportunity is not loss at all. The court does not also agree with the respondent that the lost opportunity can be compensated by damages. No law or precedent has been cited to support the respondent's view. Likewise no evidence has been tendered to prove that the claimant has been accorded similar job in terms of salary and rank by the National government.

### **Balance of Convenience**

This should be considered only when the court is in doubt as to the above two requirements. In this case the court is of no doubt that a prima facie case has been established to warrant further investigation. The court is also not in any doubt that once the opportunity to serve is lost by the claimant, the case will be overtaken by events and an award of damages may not compensate the lost opportunity.

In conclusion the court grants the prayer for injunction to restrain the 2<sup>nd</sup> respondent, from taking over the position of Head of Supply Chain Management Services for the Kilifi County pending hearing and determination of the suit. Likewise the 1<sup>st</sup> respondent, agents, servants, assigns and/or whomsoever is restrained from removing the claimant from the office of the Head Supply Chain Management pending the hearing and determination of the suit.

In making the said orders, the court is reminded of the fact that every person including the respondents are bound by the constitution of Kenya and have a duty to uphold it in ensuring that recruitment of officers to fill vacancies in the Kilifi county government are done as per the said constitution and statutes governing labour matters.. Article 232 of the said constitution was not meant to advance discrimination and unwarranted favours. If the recruitments are done in contravention or perceived contravention of the constitution and the law, this court will not hesitate to investigate it and make an impartial decision. That way Kenyans will be able to seek employment in all the 47 counties without the fear that they will be discriminated or victimized.

Lastly, the court makes the said orders of injunction while appreciating the fact that there will be no loss of services to the constituents of Kilifi County because the claimant and the 2<sup>nd</sup> respondent will continue serving as the Head and Deputy Head of Supply Chain Management Services for the County government of Kilifi pending the final decision on the dispute herein.

### **DISPOSITION**

The application dated 11/6/2014 is allowed in terms of prayer 4,5 and 6. The effect of this ruling is to retain the claimant, as the Interim Head of Supply Chain Management for the Kilifi County while the 2<sup>nd</sup> respondent shall remain his deputy, with full benefits until this suit is heard and determined.

The court further directs that due to the nature of this case, the suit shall be concluded within 2 months from today.

**Dated, Signed and delivered this 11<sup>th</sup> July 2014**

**O. N. Makau**

**Judge**