



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA NAIROBI

CAUSE NO. 794 OF 2013

(Before D.K.N. Marete)

ENGINEER MWALIMU KITHOME MUSAU.....CLAIMANT

versus

KENYA WATER INSTITUTE.....1ST RESPONDENT

GEORGE OCHILO MBOGO AYACKO.....2ND RESPONDENT

RULING

The matter before to this court is an application by way of Notice of Motion filed on 24th May, 2013 under a certificate of urgency of the same date. It seeks the following orders of court;

THAT this Application be certified urgent and be heard *ex parte* in the first instance.

THAT pending the hearing and determination of this Application *inter partes*, an interim order of injunction do issue restraining the 1st and 2nd respondents jointly and severally whether by themselves, their agents, employees, servants and/or otherwise howsoever, from terminating or purporting to terminate the employment of the claimant/applicant as the Director of the 1st respondent or from conducting any recruitment for or others filling the position of the director of the Kenya Water Institute.

THAT pending the hearing and determination of the Claim herein, an order of injunction do issue restraining the 1st and 2nd respondents jointly and severally whether by themselves, their agents, employees, servants and/or otherwise howsoever, from terminating or purporting to terminate the employment of the claimant/applicant as the director of the 1st respondent or from conducting any recruitment for or otherwise filling the position of the director of the Kenya Water Institute.

THAT pending the hearing and determination of the Claim, an order of stay do issue against the 1st respondent's decision to suspend and subsequently to interdict the claimant/applicant as the director of the 1st respondent.

THAT the costs of this application be provided for.
The application is based on the grounds, *inter alia*, that;

On 1st December, 2005 the Claimant/Applicant was appointed director of the 1st Respondent a position created under Section 8 of the Kenya Institute Act 2001, for a period of three years with the said appointment running to 30th November, 2008.

Upon satisfactory service and upon application for renewal to the 1st Respondent, the Claimant/Applicant's contract of employment was renewed for a further term of three years running from 1st December, 2008 to 30th November, 2011, a term which the Claimant served to completion.

Upon satisfactory service and upon further application for renewal to the 1st Respondent, the Claimant/Applicant's contract of employment was renewed for a further term of five years running from 1st December, 2011 to 30th November, 2016, being the term of the contract that the Claimant was serving until he was unprocedurally, suspended, interdicted and a resolution made by the Governing Council to unfairly terminate the same.

On 7th November, 2012, the second Respondent, in a meeting of the Governing Council of the 1st Respondent, tabled certain allegations purportedly made by the employees of the 1st Respondent against the Claimant's applicant relating to this conduct as director of the 1st Respondent.

The purported documents presented to the Governing Council meeting of the 1st Respondent (*the Governing Council*) were not the property of the Governing Council as they had not been duly received, stamped and presented by the Secretary to the Governing Council to the said meeting of the Governing Council.

Upon receipt of the said purported allegations, the Governing Council deliberated on the matter and resolved to constitute an *ad hoc* committee to investigate the said allegations.

The *ad hoc* committee concluded its investigations and on 22nd December, 2012 had its report (*the ad hoc committee report*) to a meeting of the Governing Council.

On 18th and 19th January, 2013 the Governing Council considered the *ad hoc* committee report and resolved *inter alia* that the *ad hoc* committee report was not final. As such no resolution was made that disciplinary action should be taken against the Claimant.

The application is supported by the supporting affidavit of Engineer Mwalimu Kithome Musau the Claimant/Applicant herein.

The claimant/applicant's case is that on 1st December, 2005, he was appointed Director of the 1st respondent. Subsequently this appointment was renewed for further terms of three and five years respectively, the last one running from 1st December, 2011 to 30th November, 2016.

On 7th November, 2012, the 2nd respondent, in a meeting of the Governing Council of the 1st respondent tabled allegations made by the 1st respondent's employees relating to the conduct of the applicant as Director of the 1st respondent. This was deliberated appropriately and an *ad hoc* committee set up to investigate the same. These investigations were concluded on 22nd February, 2012 and a report handed

over to the Governing Council. On 18th and 19th January, 2013, this report was deliberated by the said Governing Council which resolved that the *ad hoc* committee report was not final and that no disciplinary action should be taken against the claimant.

On 22nd March, 2013, the Governing Council in total disregard of the resolution by the *ad hoc* committee passed a resolution that the claimant be suspended from office. This, the claimant/applicant submits was irregular and illegal and in total disregard of law, process and guidelines regarding such dealings in the public service. The suspension letter did not proffer any reasons for so dealing thereby contravening section 41, Employment Act, 2007 and the Human Resource Policy Manual of the 1st respondent.

On 8th April, 2013, the 2nd respondent purportedly on the request of the claimant/applicant purported to commute the claimant/applicant's suspension to interdiction in total defiance of the Ministry for Water and Irrigation directive that he provides the Ministry with the Governing Council's Minutes of suspension. This culminated in a Governing Council's resolution to terminate the claimant's employment with the 1st respondent on 13th May, 2013.

The Claimant/Applicant further avers that the purported decision to suspend, interdict and subsequently resolve to terminate his employment was malicious and in bad faith and also unprocedural, unfair and illegal. It renders his rights vulnerable and unless this court intervenes, these shall be disastrously violated to his detriment and suffering.

The claimant/applicant in his supporting affidavit avers that the decision to suspend and or terminate his services with the respondent is a consequence of allegations on his conduct as director of the 1st respondent. These are *inter alia* sexual harassment, nepotism, procurement and authenticity of information shared with the 1st respondents Governing Council.

The 1st respondent, Kenya Water Institute, through the State Law Office opposes this application and relies on grounds of opposition dated 7th June, 2013 and filed on 10th instant. Through the Attorney-General of Kenya, it lays down the following grounds of opposition;

That the claimant has not demonstrated a cause of action against the respondents.

That the suit is frivolous, vexatious and otherwise an abuse of the court process. The suit is premature and pre-emptive as the respondents have not communicated the Governing Council's decision to the claimant.

That the injunction cannot issue against the respondents as there exists a contract of services that permits termination notice and the claimant has not demonstrated that he will suffer irreparable loss and damage that cannot be compensated by way of damages and further has not demonstrated that he

has high chances of success.

That it is a settled law that the employer has a right to terminate the employment in accordance with the express terms of the written contract.

There are no triable issues in this suit, the governing council's decision having not been communicated to the claimant and the governing council will be sitting on 14th June, 2013 to deliberate and communicate their final decision to the claimant.

He therefore prays that suit be dismissed with costs to the respondents.

The 2nd respondent, George Ochilo Mbogo Ayako, also opposes the application and relies on his replying affidavit sworn on a date not indicated or specified on the face of the said affidavit. There is no disclosure of the date of swearing of the affidavit. This, to me, renders the entire replying affidavit defective and therefore not appropriate as a defense in this application. It only leaves the 1st respondents grounds of opposition as the only sustainable defence and opposition to the application.

At the hearing of his application the claimant urged this court to grant prayers 2 and 3 of the Notice of Motion dated 24th May, 2013 the first two prayers have been spent by earlier orders of court granting the same. The claimant, being director of the 1st respondent had been appointed and this appointment renewed twice. He was on his third term lasting between the 1st December, 2011 and 30th November, 2016. The attempt by the respondent to terminate this third term of service is now the subject matter of this suit and application. The claimant urges this court to scrutinize the steps taken in the termination of the claimant's services and weigh the same against the scales of merit and fairness. It is the claimant's submission that the procedural aspects of the termination and the reasons thereof are not feasible thereby occasioning irreparable damages in the circumstances. He therefore urges the court to grant the prayers as sought.

The claimant's submission is that the discussion of issues on this subject before the Governing Council was irregular in that there was no formal agenda to introduce the same as the business of the meeting of the Governing Council at its meeting of 7th December, 2012. Moreover, the claimant contends that the constitution of the *ad hoc* committee that deliberated the issue is contested and now on trial. Several meetings were held by the Governing Council and culminated in the suspension of the claimant.

The claimant further submits that the action of the respondent in suspecting him are contrary to section 41 of the Employment Act, 2007 in that no reasons were offered for suspending him, neither was he afforded an opportunity for a hearing of his case and therefore the fallacy and illegality of the proceeding and suspension. The claimant also contends that the termination of his contract is ruinous to his career and therefore the prayer for orders deterring the appointment of any other

person to this office.

Mr. Motede, counsel for the 1st respondent at the hearing submitted that prayer No. 4 is spent and the court cannot issue an injunction against that which has already happened. The claimant is already suspended and therefore the correct remedy would have been judicial review to quash the decision to suspend.

The 1st respondent also submits that the claimant has not complied with the tenets of the authority of **Giella Vs Cassman Brown & Co. Ltd, [1973] E.A. 358** on injunctions. These are, *inter alia*;

- (i)
- (ii)
- (iii)
- (iv) *an applicant must show a prima facie case with the probability of success*
- (v) *an injunction is not normally be granted unless the applicant might suffer irreparable loss*
- (vi) *when the court is in doubt, it would decide on the balance of convenience*

He has not demonstrated a prima facie case with a probability of success and also that in the event of success, damages would not be an adequate remedy to him. In any event, the 1st respondent is merely pushing disciplinary action against an employee which is his legal duty and entitlement. To him the issues for determination are;

- (i) Whether the claimant was accorded a chance to be heard?
- (ii) Was the suspension justified?
- (iii) Whether the notice of the Office of the President was applicable to the Respondent?
- (iv) Was the claimant aware and actively involved in the termination process?
- (v) Whether an injunction can issue in the circumstance?

The deliberations of the *ad hoc* committee of the Governing Council of the 1st respondent wholly involved the claimant in deliberations relating to the mentioned complaints against him. He was offered an opportunity to answer all allegations against him in full. This to me, was an opportunity of being heard and therefore rebuts any claims of the absence of the same.

The claimant has not addressed the issues raised and found true on investigation by the *ad hoc* committee. He only alleges breach of conduct and the law in that there was no consultation or approval of his suspension by the minister in charge. The 1st respondent answers this explicitly and states that the officer who wrote the letter of assertions from the Ministers office was neither authorized nor gazetted. Therefore, this communication lacks in substance and authority.

The matter at this stage is interlocutory and the court is warned that the trial of the

substantive issues in dispute shall come at full trial. The issue before the court presently is a determination as to whether injunctive relief sought should issue in the circumstances.

The parameters as set out in **Giella Vs Cassman Brown**, supra, though now utilized with caution as a consequence of the new found liberties under the bill of rights in the constitution of Kenya, 2010.

The defense by the 2nd respondent is ousted by the invalidity of his replying affidavit. As earlier observed, this cannot pass the test as the same does not disclose of the date of swearing and is therefore defective.

I find that this application is not sustainable and must be disallowed. This is because it does not establish a prima facie case in the circumstances with a possibility of success. It also does not attempt to demonstrate, or even so demonstrate a case where damages would not be an adequate remedy in the event of success.

The claimant must now go on trial for final determination. I have however noted the defect in the replying affidavit of the 1st respondent in answer to the claim. I award leave to the party to regularize his replying affidavit even if for mere cosmetic purposes.

I therefore order as follows;

That this application be and is hereby dismissed with costs.

That the interim orders issued on 24th May, 2013 in terms of prayers 1 and 2 of the Notice of Motion of the same date be and are hereby vacated and or discharged.

That the 2nd respondent be and is hereby awarded leave to rectify and regularize his replying affidavit.

That the costs of this application shall be borne by the Claimant/Applicant.

Dated, delivered and signed this 17th day of July, 2013.

D.K. Njagi Marete,

JUDGE

Appearances:

1. Mr. Kilonzo instructed by Sisule Munyi Kilonzo & Associates for the claimant.
2. Roch Odhiambo instructed by Odhiambo & Company Advocate for 2nd respondent.
3. Mr. Motede instructed by the Attorney-General of Kenya for the 1st respondent.