



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 951 OF 2013

BETWEEN

JASPER NYABOGA.....CLAIMANT

VERSUS

PARTY OF NATIONAL UNITY.....RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Khaseke instructed by Mohammed Muigai Advocates for the Claimant

Mr. John Mngola instructed by Humphrey & Company Advocates for the Respondent

RULING

The Respondent Party of National Unity (PNU), is a Political Party registered under the Political Parties Act No. 11 of 2011.

It employed Jasper Nyaboga as its Executive Director, effective from 18th February 2009. He was offered a consolidated monthly salary of Kshs.350,000, subject to annual cost of living adjustment, at the rate of 10% of the monthly salary. The written contract of employment dated 20th February 2009, also offered the Claimant gratuity at the rate of 25% of his annual salary, payable every end of the year.

The Contract was to run from 18th February 2009 to 31st December 2012. Clause 1 of the contract states:-

“At the end of this period, the contract shall be reviewed for renewal on fresh terms to be negotiated by both parties.”

The Claimant states his contract was terminated by the Respondent with effect from 31st December 2012 when he was on annual leave, and without any notice that there would be no renewal. He was not paid 3 months’ salary in lieu of notice, or gratuity, as stipulated in the contract.

He initiated this Claim on 21st June 2013. He seeks 12 months’ salary in compensation for unfair termination at Kshs.5,082,000; gratuity for a period of 3 years and 10 months at Kshs.4,639,625; and 3

months' salary in lieu of notice at Kshs.1,270,500, adding up to Kshs.10,992,125.

The Statement of Claim is accompanied by a Notice of Motion, made under sections 3 and 12 of the Industrial Court Act No. 20 of 2011, and Rules 16 and 27 of the Industrial Court (Procedure) Rules 2010.

The motion seeks the following orders:-

(a) An injunction restraining the Respondent or its factors, pending hearing and determination of this application *inter partes*, from dealing with the funds deposited in Respondent's Account Number 0180260685715, Equity Bank, Community Corporate Branch, N.H.I.F. Building, Nairobi;

(b) In the **alternative**, a conservatory order be issued preserving a sum of Kshs.10,992,125 of the Respondent's funds deposited in the said Bank Account;

And, Pending hearing and determination of the Claim:-

(c) An order that the Respondent deposits in Court the sum of Kshs.10,992,125 as security, within 7 days from the date of this Ruling; or

(d) An injunction restraining the Respondent or its factors, pending hearing and determination of the Claim, from dealing with the funds deposited in the given Bank Account.

The application is anchored on the affidavit of the Claimant sworn on 21st June 2013, and on other grounds listed on the face of the Motion.

John Okemwa Anunda, Secretary General of the PNU swore an affidavit on 8th July 2013, opposing the application.

He admits the Claimant was employed by PNU as the Executive Director, in a fixed term contract, which came to an end on 31st December 2012. There was no obligation on the part of the Respondent to renew the contract, and there was no legitimate expectation created on the part of the Claimant, that his contract would be automatically renewed upon expiry.

The PNU is registered under the Political Parties Act, 2011. The Act provides for registration, regulation and funding of Political Parties. Section 23 establishes the Political Parties Fund, which is administered by the Registrar of Political Parties; Section 24 provides for sources of monies in the fund; while Section 25 (1) provides for the distribution of the funds.

The administrative and staff expenses of the Political Party, shall not be more than thirty percent of the monies allocated to the Political Party. These monies shall not be used for any other purposes other than those specified in the Act.

It is important to note that such amount of money used by Political Parties for administrative and staff expenses are utilized throughout the country, in the Party Branches.

The Respondent holds that if the proposed interim orders are granted, the Party's activities nationally, would be hampered.

The application was heard *inter partes* on 9th July 2013. Mr. Khaseke emphasized the need to uphold the Claimant's employment protections. He informed the Court that PNU does not have a single Member of Parliament in the current Parliament, having not fielded candidates in the last National Ballot. Its apportionment of funds under the Political Parties Act 2011 is therefore on a downward curve. It cannot be expected to honour without fuss, any monetary Award the Claimant is likely to obtain at the end of the proceedings, and hence the need for the Respondent to supply security. Mr. Khaseke argues that the very least the Court should do in availing employment protection to the Claimant, is to order for the

preservation of the gratuity sum of Kshs.4,639,625. No evidence of payment of gratuity has been offered by the PNU.

Mr. Mngola urges the Court to appreciate the political parties' protections and regulations, given under the Political Parties Act 2011. The Court must not grant orders that would stifle the operations of PNU. Monies allocated to Political Parties are only used for purposes compatible with democracy. Administrative and staff expenses shall not be more than thirty percent of the monies allocated a the Political Party.

The Court Finds and Orders:-

- 1.The Party of National Unity did not participate meaningfully, in the Kenya National Ballot of Mach 2013. It is not eligible under Section 25 (1) (a) of the Political Parties Act 2011, to receive funds. The provision requires that funds are distributed to the Political Parties, "... *proportionately by reference to the total number of votes, secured by each political party in the preceding general election.*"
2. Without this source of funding, the PNU's sources are limited. Mr. Mngola mentioned some of these limited sources as donors and membership fees. The apprehension by the Claimant that the Respondent may not have the financial wherewithal to satisfy any Award given in favour of the Claimant, is not farfetched. It is a well-founded apprehension.
3. The funds currently available to the PNU, cannot be said to have been applied for purposes outside Section 26 of the Political Parties Act, by being deposited in the Court or frozen at the Bank, through interim orders of the Court, to ensure PNU's obligations to its former Executive Director Jasper Nyaboga, are honoured.
4. It would be reckless of the Court if it were to fail to secure an employee's accrued benefits and possible compensatory Award, on the basis that interim orders for security would destabilize a former employer, who happens to be a Political Party.
5. Political Parties in Kenya are very fragile enterprises. They are short on life expectancy. It is not unusual to have a Political Party producing today's President, and in five years time, is a slow, punctured, and unrecognisable entity, without even a County Representative in any part of Kenya. Employees of these Political Parties merit adequate protection from the Industrial Court. The Court has a responsibility to ensure such employees have social protection.
6. In this dispute there is *prima facie* evidence that the Executive Director was entitled to gratuity for the 3 years and 10 months worked, under his expired contract, amounting to Kshs.4,639,625. When the Court asked the Respondent if this gratuity has been paid, the Respondent answered that it is for the Claimant to prove gratuity has not been paid. An employer, as the custodian of employment records, would be expected to avail records of terminal benefits paid to employees, and not demand that employees prove non- payment. *Prima facie* evidence shows gratuity to have accrued, and was not paid after 31st December 2012.
7. While the Court appreciates that the Claimant's contract was for a fixed term, lapsing 31st December 2012, Clause 1 of the contract on review for renewal, can be argued to create legitimate expectation on the part of the Claimant, that his service would be in continuity. Nyaboga was on annual leave, when the message got to him that he would not be resuming duty at the PNU. He was not advised in advance of his annual leave, that there would be no return. These are arguable grounds on the fairness of termination. The Claimant may at the end of the hearing be, or not be, entitled to compensation. In either case, the Court is satisfied that the Claimant has demonstrated he merits provisional measures by way of security for the unpaid gratuity, notice pay, and possible compensation.

IT IS HEREBY ORDERED:-

(a) The Respondent shall deposit in Court as security, the sum claimed as gratuity of Kshs.4,639,625, within 7 days of this Ruling.

(b) The Respondent shall deposit in Court within 7 days of this Ruling a further sum of Kshs.5,000,000, as security for any compensatory Award and other terminal benefits, that may be found due to the Claimant at the end of the proceedings.

(c) In default of either (a) or (b), the Claimant is at liberty to execute the orders.

Dated and delivered at Nairobi this 12th day of July 2013

James Rika

Judge