



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
PETITION NO. 48 OF 2012

DOMOTILA WANZILA MUVANYA PETITIONER

VERSUS

INSURANCE REGULATORY AUTHORITY1ST RESPONDENT

SAMMY MUTUA MAKOVE.....2ND RESPONDENT

GODFREY KIMAIYO KIPTUM.....3RD RESPONDENT

MARY WANJIRU AZEGELE4TH RESPONDENT

AND

FELIX CHELIMO INTERESTED PARTY

RULING

1. This is a ruling relating to an application filed by the 1st, 2nd, 3rd and 4th Respondents (respondents) dated 15th January 2013 and the application of the Interested Party herein dated 16th January 2013. Both applications were argued consecutively, they relate to the same course of action and or are related in material facts and will therefore all the issues will be consolidated.
2. The respondent Notice of Motion of 15th January 2013 was filed under the provisions of Article 162(2)(a) and 165(5)(b) of the Constitution, section 16 of the Industrial Court Act, rule 16(1) and (2) of the Industrial Court (Procedure) Rules on the seeking the following orders;
 - a. *That this honourable court be pleased to stay the ex parte orders of injunction issued on 19/12/12 pending the inter-partes hearing and determination of the Petitioner's application dated 14/12/12.*
 - b. *That this honourable court be pleased to set aside and/or discharge the ex parte orders of injunction issued on 19/12/12, which orders were issued pending the hearing and determination of the Petitioner's Chamber Summons Application dated 14/12/12.*
 - c. *That the honourable court be pleased to strike out the entire Petition for want of jurisdiction.*
3. This application is supported by the annexed affidavit of Sammy Mutua Makove, the 2nd respondent and the chief executive officer of the 1st respondent and on the grounds that on the 19th December 2012 the Petitioner through their application dated 14th December 2012 obtained ex-parte orders of injunction staying the termination of her contract of service in a letter dated 26th November 2012 and the orders compelling the respondents to reinstate all her job benefits pending

- the hearing and determination of her Petition. That these ex-parte orders were obtained by the petitioner after she grossly misled the court into believing that she was the head of procurement at the 1st respondent, a position she never held and that she also failed to inform the court that this post was a new position created following her recommendations to the respondents and Kenya National Audit office (KNAO) in her capacity as the Senior Procurement officer, which recommendation was approved by the respondents board.
4. Further grounds are that the ex-parte orders were obtained without disclosing to the court that the respondents new post of Head of Procurement occupied after the a recruitment following a competitive process which saw several interested applications who included the Petitioner who applied, were short listed and interviewed for the post and therefore the Petitioner had not been demoted, rather she was an unsuccessful candidate for the new position but retained her title and benefits in line with her contract of service. That the Petitioner failed to inform the court that she had offered to prepare a handing over report to the respondent officer Head of Procurement and that in a meeting held on 26th November 2012 she refused to comply with instructions given to her by her supervisor and hence the injunctive orders were wrongly obtained for non-disclosure of material facts. That all these notwithstanding, the respondent had complied with the court order.
 5. However the respondents note that the Petitioner's conduct and performance of her duties as the Senior Procurement Officer with them is wanting as she has failed to adhere to the Provisions of the Public Procurement and Disposal Act and the Regulations, the working relationship with her superiors has irretrievably broken down due to disobedience of lawful commands and defiance of employment rules and that her reinstatement will jeopardise the smooth running of their day-to-day functions. That should the court dismiss the Petition, the petitioner shall not be able to reimburse all the job benefits paid to her during the pendency of the exparte order as she came to court without disclosing material facts to this case.
 6. On the other hand the IP Notice of Motion is brought under the provisions of Article 159(2)(d) and 165(3)(d)(i) and (ii) of the Constitution, section 12 and 16 of the Industrial Court Act, Rule 32(c), (d) and (e) of the Industrial Court (Procedure) Rules seeking the following:
 - a. ***That the honourable court be pleased to set stay the exparte orders granted on 19th December 2012 pending the hearing and determination of the application.***
 - b. ***That the honourable court be pleased to review, vary and/or set aside the orders granted exparte on 19th December 2012.***
 - c. ***The honourable court be pleased to strike out the Petition ex-debito justae and for want of jurisdiction***
 - d. ***Costs of the application are borne by the Petitioner.***
 7. The application is supported by the annexed affidavit of Felix Chelimo, the Head of Procurement of the 1st Respondent, and on the grounds that the orders granted exparte on 19th December 2012 to the Petitioner are prejudicial to the respondents and IP as it gives the Petitioner advantage and tends to condemn the respondents and the IP unheard and that the same were obtained through multiplicity and convoluted of grievances pest riding various jurisdictions of this court and the High Court which is contrary to the law. That these orders threaten to bring down the operations of the 1st respondent as there exists bad blood between the petitioner and the respondents and their co-workers where the Petitioner has threatened to use the orders to intimidate the respondents and their co-workers at the work place by instituting contempt proceedings against them.
 8. The IP further states that the orders herein granted to the petitioner threatens to and are designed to visit serious and advance consequences on the Board of directors of the 1st respondent particularly in discharging its duties of restructuring its various functions and operations and more so supervising, assigning duties redeploying and promoting its staff members in pursuant of its mandate within the Insurance Act. Thus the orders have detrimental effects on managers of various divisions of the 1st respondent in the discharge of their duties particularly of disciplining its staff members.
 9. In response, the Petitioner in her Replying Affidavit dated 18th February 2013 state that all parties herein are bound by the provisions of the Constitution with respect to Article 2, 3, 10, 19, 20, and 232 with regard to its supremacy, objectives, values and principles, the application of Bill of

- Rights applicable to all persons and the conduct of public officers in public service and performance of their duties as such. That the respondents in their personal and corporate are obligated to respect and uphold the Constitution and should be accountable for their acts or omissions that are contrary to its provisions. That the 1st respondent is incapable of issuing unconstitutional or illegal orders to the 2nd, 3rd and 4th respondents and that they herein acted in their personal capacity.
10. That the conservatory orders granted to the Petitioner on 19th December 2012 were made with full disclosure of all material facts to the Petitioner and the respondents application is only intended to derail the application made on the basis of non-compliance with orders made on 19th December 2012 for leave to institute contempt proceedings and to close the disobedience with some legality and thus an abuse of the court process. That the petitioner was able to demonstrate to court that she had a prima facie case with triable issues that have high chances of success and that unless the conservatory orders is granted she will suffer prejudice as a result of the contravention of her rights.
 11. That the petitioner was able to demonstrate the fact that her employment and confirmation as the substantive Head of Procurement and that at all times she performed the prescribed duties and responsibilities of the head of Procurement Unit and in blatant violation of the respondent's own Human Resource Procedures Manual, Employment law and Constitution, the 1st respondent employed the IP as the Head of Procurement Unit. That the respondent irregularly assigned the IP all her duties and responsibilities and at the same time without consultation purported to assign her duties lower in rank and thereby forced her to accept a demotion.
 12. That the subsequent demotion and dismissal were a contravention of the petitioner's labour rights with regard to fair labour practices, fair administrative action, fair hearing and right not to be demoted or dismissed without due process of the law and the court should protect her interests. The Petitioner further states that the 1st respondents was unequivocal in its vacancy notice of 23rd April 2010 that she was the substantive head of Procurement Unit in that she was to report to the Manager, Human Capital Development and Administration, as the head of Procurement Unit and that in her job description her duties and responsibilities were those of the head of Procurement Unit. That the petitioners duties were as prescribed under the Regulation 8(3), 13(4), 16(3), 17(2), 20(5), and 58(2) of the Public Procurement and Disposal Regulations, 2006 (Regulations) and thus she was the de jure head of procurement unit.
 13. That subsequent to the appointment of the Petitioner, she was appointed the secretary of the Tender Committee and Disposal Committee pursuant to Section 26(5) (b) of the Public Procurement and Disposal Act, 2005 (PPDA) in her capacity as the head of procurement unit as the respondent was aware that this position was at all material times to be held by the head of the procurement unit. That the 2nd respondent is under the obligation to ensure the strict compliance with the Regulations and provisions of the PPDA and the directions of the Public Procurement Oversight Authority. That by virtue of section 26(4) PPDA and respondents established the procurement unit and the petitioner was thus recruited to head the unit noting the erroneous administrative reporting structure that existed before.
 14. That in essence the respondents were supposed to delink procurement unit from human resource capital development and administrative division to correct the erroneous reporting structure of the procurement unit and to align it to the directive of the Public Procurement Oversight Authority (PPOA). That such reorganization did not require the replacement of the Petitioner but rather was meant to streamline the reporting structure of the procurement function as outline under the Regulations, PPDA and PPOA. That vide Legal Notice No. 174 of 29th December 2006, the respondent ought to have ensured that the procurement unit reported to the Accounting Officer as from 1st January 2007 or by March 2009 the date set by the PPOA.
 15. That when the respondent decided to externally advertise the position of head of procurement unit they violated clause 1.7 of their policy manual that required promotions from a lower to a higher grade be the main avenue for advancement for staff unless there was no suitable candidate then external recruitment could be considered and thus by failing to promote the petitioner or advertise internally for the position of head of procurement, the respondents failed to adhere to their policy manual. That all administrative procedure in recruitment of staff were flouted and ignored and the Committee constituted for the interview panel was in disregard of the policy manual, the

Regulations and DDPA and the guideline issued by PPOA. Thus the recruitment of IP was procedurally flawed and violated Petitioner's rights.

16. That noting all the issues in the Petitioners case, section 35(4)(b) of the Employment Act is inconsistent with Article 19(1), 20(1), 35(1)(b) and (2), 41(1) and (2)(b), 47(1) and (2), 50(1) and (2)(b), (c), (j) and (k) and 236 (b) of the Constitution and is therefore void and of no effect. that the court has jurisdiction to hear the matter under its constitutional and legal jurisdiction conferred under Article 23(3)(d) and 259(1) of the Constitution an section 21(2) of the Industrial Court Act to declare section 35(4)(b) of the Employment Act violates the Petitioner's rights in the Bill of Rights and therefore invalid.

I will consolidate all the issues herein as following;

- a. **Question of jurisdiction**
- b. **Question of stay of orders of injunction issued on 19th December 2012 pending the hearing of the Petition**
- c. **Question of setting aside and/or discharge of ex-parte orders of injunction issued on 19th December 2012**
- d. **Question of review, vary and/or set aside the ex-parte orders of 19th December 2012**

17. The Constitution of Kenya under Section 10 now outlines what kind of a judiciary Kenyans agreed to have when they passed it in a referendum in 2010. The High Court is set out within which are the special courts under Article 162(2). These are superior courts with the same status as the High Court with specialized mandate as regard labour relations and land and environment matters. As part of the High Court the labour relations court or the commonly referred to 'Industrial Court' is a High Court as under the powers granted under Article 165(1) established to;

Determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened [and] to hear any question respecting the interpretation of this Constitution.

18. The above provisions must however be seen in the 'special status' of the Industrial Court as established under the Constitution and the power conferred as under the High Court to deal with labour related issues in the process of addressing questions of rights and fundamental freedoms in the Bill of Rights and in its interpretation of the Constitution. These are matters that must be looked at in an inclusive manner as they are interdependent, interrelated and indivisible. If these were to be set as separate mandates as between the various divisions of the High Court with the exclusion of labour relations claims, then there would be a multiplicity of suits arising out of the same cause of action, which would be an effort to defeat the very purpose of the Constitution that establishes the Industrial Court as a Superior Court as under Article 162(2).

19. However for the Industrial Court to address matters relating to claims arising out of the violation of the Bill of Rights outlined in the Constitution, it must take due cognizance of Article 23 which mandates Parliament to enact legislation giving original jurisdiction in appropriate cases to the court to hear and determine and redress denial, violation of a fundamental right or freedom. If this is not cured by the enactment of the Industrial Court Act, 2011 then the power to be 'a constitutional court' for the purposes set out under Article 23, the Industrial Court as a Superior Court is as under Article 165 given the powers to arbitrate any matter of a constitutional nature framed to invoke the right to fair labour practices as under Article 41.

20. Further, by Parliament enactment of the Industrial Court Act, 2011 which Act further restate the position as under the Constitution in Article 162(2), the Industrial Court has the jurisdiction to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011. This was also outlined Justice Ongaya in ***Beatrice Achieng Osir versus Board of Trustees Teleposta Pension Scheme, industrial Cause No. 665 of 2011;***

The jurisdiction of the industrial Court is therefore essentially the jurisdiction of the High Court as provided for in sub-Article 165(3) of the Constitution and with

boundaries limited to employment and labour relations as amplified by Industrial Court Act, 2011.

21. Therefore noting the applications from the Respondent, the IP and the submissions of the Petitioner, this Court is clothed with proper jurisdiction and has powers to interpret, review and redress any constitutional rights that arise out of labour relations. I find that the cause of action herein arose from the termination of the Petitioner by the respondents from her employment, the action that prompted her to come to Court under a Certificate of Urgency. This cause of action is a matter that is rightly before this court and any other subsequent orders, remedies, entitlement that the petitioner may wish to address in the same series emanating from the employment relationship. These are matters within the jurisdiction of this Court as per the Constitution, Industrial Court Act and all other enabling statutes and inherent powers of this Court.
22. On the question of stay of the orders of this court, I note the principles as outlined in several cases cited by the parties herein and will only give mention to a few that compound the principles noting in ***Habib Bank Attorney general Zurich versus Eugene Marion Yakoub, Civil Application No. Nairobi 43 of 1982 [1982] LLR 4977*** the court outlined these principles as; a case must have probability of success noting that the court is only to gauge the strength of the plaintiff's case and not to adjudge the main suit at that stage since proof is only required at the hearing. Impropriety of making decisions on affidavit evidence and that this should be made in exceptional cases. Further in the case of ***Barrack D. Okul versus Esso (K) Ltd, Civil Case No. 342 of 1988***, Tunoi J, [as he then was]; held

The conditions for grant of an interlocutory injunction are (1) the probability of success (2) irreparable harm which would not be adequately compensated for by damages and (3) if in doubt, then on a balance of convenience ... where damages would be an adequate remedy, the breach of contract even if uncontroverted, is not normally ground for injunction.

23. Did the Petitioner satisfy these principles in the first instance? Was she entitled to the orders granted on 19th December 2012? Should these orders be reviewed, set aside and or varied?
24. The Petitioner in the Petition dated 14th December 2012, also filed a Chamber Summons seeking interim orders against the respondent for a temporary stay of her termination from employment by the 1st respondent in their letter dated 26th November 2012 and subsequent stay of the consequential implications on the appointment of the IP so that the Petitioner's status is maintained to enable her discharge the duties of head of procurement and to have the benefits appertaining thereto.
25. The Chamber Summons was on the grounds that the petitioner's fundamental rights and freedoms as under the Constitution had been contravened, there was apprehension that if these rights were not protected by the court the respondents were going to contravene them as her dismissal from the 1st respondents employ was arbitrary and in disregard of the Constitution. On this basis and on the submissions of the petitioner's advocates, the court directed the stay against the termination of the petitioner by the 1st respondent dated 26th November 2012 and also directed that she retains her job benefits pending the hearing of her application and parties were directed to attend an inter-parties hearing.
26. This court is now asked to stay these orders, review them or set them aside pending the hearing. The orders granted were interim pending the application presented by the Petitioner.
27. The traditional test to be satisfied by an applicant in an urgent interdict, prohibition, injunction or embargo, or the conservatory orders that the Petitioner was seeking is to show that the right which is the subject matter of the main action and which the applicant seeks to protect by means of interim relief is clear or, if not clear, is prima facie established though in doubt. Also in the same vein the applicant must demonstrate that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and if she ultimately succeeds in establishing her right. It must also be demonstrated that the balance of convenience favours the granting of interim relief and that there is no other satisfactory remedy.

28. It is not in dispute that the petitioner was dismissed from her position vide respondents letter dated 26th November 2012, this followed the job interview and the appointment of the IP as the head procurement. On this course of events, the Petitioner felt aggrieved and approached court to have her rights protected noting that as the senior procurement officer of the respondent and having undergone the job interview and noting the respondent human resource manuals, that she was unfairly treated by not being appointment the head of procurement and thus demoted. It is also not disputed that the IP has now been appointed to the position of head of procurement of the respondent.

29. On this basis, I find the Petitioner's apprehension at this point that her rights were contravened and may not be able to have them protected was well founded and was justified to approach this court noting her employer/employee relationship with the respondents and the IP. This finding is grounded on section 43 to 46 of the Employment Act, 2007 as read together noting that;

43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

30. This reasoning is with regard to any termination as even where there exists reason or reasons for termination, an employee is legally entitled to challenge these reason or reasons or fairness of the process. This is what in the tradition of this court is called substantive and procedural fairness;

45. (1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

a. **That the reason for the termination is valid;**

b. **That the reason for the termination is a fair reason—**

ae. Thus an employee aggrieved by the decision of her employer to terminate or in any other way adversely affect her employment or other right or rights at the work place, can seek under the Constitution, the Employment Act and other statutes and by application under the Rules of this Court to have her rights protected. In the first instance, this court may grant interim orders to enable the party secure these rights or avoid further injury as notice is issued to the other party who may wish to defend such an application.

af. I therefore find the Petitioner herein through the application dated 14th December 2012, had a good reason to warrant the court to hear her application and based on that make the interim orders granted then. The conservatory orders made herein were therefore made on good reason.

ag. That established the court must also ascertain the other limbs for the grant of conservatory orders. In that there is no other adequate remedy and thus the balance of convenience tilts to the benefit of the applicant.

ah. An employer and employee relationship though established under a contract is not an ordinary contract. This relate to human services that affect a persons' life and even though the parties to this relationship may have a contract that outline the terms and conditions of their relationship, an employee should not be treated as a chattel, item or a machine that should be discarded at will only to take the next available machine from the shop shelves. There is more to the employer/employee relationship than that. I note the respondents do acknowledge this fact in their submissions when they state that the relationship at their offices in the presence of the Petitioner have become so strained that taking her back will affect the work place environment. Precisely, this is what an employer/employee relationship entails. Those interpersonal relationships at the work environment that go beyond the contractual obligation on paper. People need that human face, that common good as exercised by all those at the workplace to make the same conducive and for the employee to be productive.

ai. In that respect therefore, an employer cannot be found to say that they can thus terminate an employee at will simply because the employee can be remedied in damages. Or simply because they can afford to pay her off. Or that they have enough resources to pay in compensation for any

- damage that may occur. Or that since the Employment Act allow other remedies, then the Court should take these other remedies but not that of reinstatement. If this was the only option, then employers would discard employees at will despite the clarity of the law since they know they can pay in damages to avoid a reinstatement. This would be to defeat the very purpose of the law where the Court can order a reinstatement if this is established as the right remedy in the circumstance of a particular case. Therefore the conservatory orders granted are to ensure that no party suffers prejudice as against the other simply because one can be able to pay, and the other, due to their changed circumstances has to accept this pay.
- aj. These are the principles outlined for this Court in the performance of its duties when Parliament enacted the Industrial Court Act with a preamble stating as under section 3 of the Industrial Court Act, 2011; which declares the principal objective of the Act as to enabling the court to facilitate the just, expeditious and proportionate resolution of disputes under the court's jurisdiction. The Court must at all times ensure that its decisions meet facilitate justice, promptly and in an impartial manner. Parties to a dispute have to accept these principal objectives as they cut across labour harmony. Thus the grant of conservatory orders to the Petitioner was not far-fetched; it was a remedy available to the Petitioner from this Court.
- ak. On the prayers seeking review, vary or setting aside the orders herein as submitted by the respondents and the IP, these are orders granted upon the court being satisfied that there is discovery of new and important matter or evidence, which after the exercise of due diligence was not within the knowledge of the party so seeking to review, vary or set aside a particular order. Also that that party was unable or could reasonably not be able to produce such evidence at the time the court made orders or for sufficient reasons upon being established the court may set aside or vary its orders.
- al. It was submitted that the petitioner failed to disclose material particulars that were within her knowledge at the time she came to court and got orders dated 19th December 2012 and that by so doing, the court did not have all the facts necessary before making its orders.
- am. Having established above that the petitioner as of 19th December 2012 was able to present a prima facie case that the court found to have warranted the granting of the orders made then, I will not delve into this second limb of the respondents' and IP application. This becomes subsumed in the first prayer.
- an. However, subsequent to the orders that were granted to the Petitioner and the applications submitted by the respondents and IP, I am guided by the applicable law and note that the interim orders granted on 19th December 2012 were of the effect a reinstatement of the Petitioner to her position as of 26th November 2012. This order was made in the interim. Other applications, replies and submissions have been since filed by all parties. I take cognisance of these quick responses.
- ao. Under section 50 of the Employment Act, 2007, the court is required to be guided with the provisions of section 49 in determining an order for reinstatement or re-engagement. In the present case the Petitioner had been reinstated in the interim. Under subsection 49 (4) (d) of the Act, the court should take into account the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances. The respondent and IP submitted that the reinstatement of the Petitioner will disrupt their operations as the Petitioner's orders herein threaten to bring down the operations of the 1st respondent as there exists bad blood between the petitioner and the respondents and their co-workers where the Petitioner has threatened to use the orders to intimidate the respondents and their co-workers at the work place by instituting contempt proceedings against them. These averments are in the Affidavit of the 2nd respondents and the IP.
42. The 2nd respondents as the responsible officer of the 1st respondent would want the decisions of the respondent enforced whereas the IP would wish to retain his position that is being challenged by the Petitioner. The respondents and the IP are a public body and public officers who should be working for the interests of all irrespective of differing opinions at the work place amongst the employees. This should be the premise within which the matters herein should be based on and not on individual interests. A public body remains as such and should be governed by all that which is good and to the public benefit. The orders herein should not be viewed as against the private persons behind the public entity but rather in their capacity as public officers out to serve a public

good.

43. Without going into the merits of the Petition and with the above analysis I find that there are triable issues in this matter that go to the core of the Petitioners fundamental rights and freedoms vis-à-vis her employment by the respondent as well as respondents' work place practices, policies and procedures with regard to key positions as outlined by the petitioner who was before her termination the senior procurement officer and member of the tender and procurement committee and vide processes and procedures that are governed by the PPDA. These are salient issues that this Court should address as outlined in the petition. These issues cannot be concluded at this interlocutory stage.

44. The Petitioner came to court when termination of her contract had already taken effect. She has challenged this in her Petition as well as raised other issues that require arbitration.

I will therefore direct as follows that status quo be maintained pending the hearing of the Petition. Costs will be in the Petition.

Delivered in open Court this 9th day of July 2013

M. Mbaru

Judge

In the presence of

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