



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1808 OF 2011

BETWEEN

ELIZABETH OUMA
CLAIMANT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE
RESPONDENT

Rika

J

CC. Mr.

Kidemi

*Mr. Karanja instructed by Keyonzo, Mweseli & Karanja for the
Claimant*

*Mr. Ndeda holding brief for Mr. Maondo instructed by Muriu, Mungai & Company Advocates for the
Respondent*

RULING

1. The Claimant was employed by the Respondent State Corporation as the Senior Legal Principal Officer. She was summarily dismissed on 18th July 2011. She filed this Claim on 27th October 2011, asking the Court to find the dismissal to be unfair, and order that she be re-instated. The Respondent filed its Statement of Reply, and the main Claim is due for hearing on 26th September 2013.
2. On 21st June 2013, the Respondent announced in the 'Daily Nation Newspaper,' that the position of Senior Principal Legal Officer at the Respondent is vacant. Dynamic, innovative and experienced persons were invited to apply to fill the position. This triggered the filing of the application dated 21st June 2013, in which the Claimant prays for an injunction restraining the Respondent from recruiting, employing, hiring, and/or filling the Claimant's position of Senior Principal Legal Officer, pending the hearing and determination of this matter.
3. On 11th July 2013, the two Advocates agreed to have the application disposed of by way of written submissions. The respective submissions have been placed on the record, and the Court had advised the

Parties Ruling would be delivered on 30th September 2013.

4. The Advocates did not bring it to the attention of the Court that the main hearing is scheduled for 26th September 2013, 4 days before the date given for the Ruling.

5. With this in mind, the Court does not think the application serves the Claimant any purpose. In matters of this nature, where the Claimant has prayed for reinstatement in the substantive dispute, it is prudent for the Claimant to seek to prosecute the main claim expeditiously, instead of bringing interlocutory applications that divert from the main dispute.

6. The Respondent has taken some years from the date the Claimant was summarily dismissed, to declare her position vacant, and seek a replacement. Summary dismissal was two years ago, on 11th July 2011. The Claim was filed on 27th October 2011. The Claimant appeared in this Court on 15th December 2011, when she informed the Court that there was another matter, Cause Number 142 of 2010 appearing before Justice Stewart Madzayo, which she wished to consolidate her present Claim with. On 28th February 2012, the Claimant went before Justice Madzayo and informed him she was no longer interested in having the two files consolidated. The present dispute reverted to this Court. Thereafter, the Claimant has appeared in this Court and told the Court negotiations between the Parties were underway. Parties have sought to amend their initial pleadings.

7. The effect of these movements in the file history is to delay the determination of the main dispute. The Claimant has not acted with speed towards the disposal of the main claim. Whether a position should be declared vacant, and replacement sought, is a prerogative of the employer. The Court does not seek to unnecessarily stifle management prerogatives, particularly as a provisional measure. Employers ought to know however, even as they go about filling vacancies such as that created by the departure of the Claimant, that filling up of the position does not affect the orders of reinstatement that the Claimant may eventually be granted by the Court. A prudent employee should fast track the main claim for reinstatement, and a prudent employer, while free to exercise its managerial prerogative, should always anticipate there could be orders given by the Court to receive back the former employee.

8. The Court Orders:-

[a] The application dated 26th June 2013 is rejected.

[b] Main hearing to proceed on 26th September 2013 as scheduled.

[c] The Ruling date on the application dated 26th June 2013 is changed from 30th September 2013, to a date before 26th September 2013. The Court shall notify the Parties.

Dated and delivered at Nairobi this 17th day of **September, 2013**

James Rika

Judge