



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 363 OF 2013

JOSEPH MAINA THEURI.....CLAIMANT

-VERSUS-

GITONGA KABUGI.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF

LAIKIPIA.....2ND RESPONDENT

GAKUHI CHEGE.....3RD RESPONDENT

THE NYAHURURU WATER AND SANITATION

COMPANY LIMITED.....4TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 1st November, 2013)

RULING

The applicant filed an application by way of the Notice of Motion dated 23.10.2013. The application was brought under sections 3 and 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules, and Sections 45 and 49 of the Employment Act. The application was grounded upon the supporting affidavit of Joseph Maina Theuri, the claimant, filed together with the application on 24.10.2013. The claimant made the following prayers:

- a. **That the application be certified as of utmost urgency and be heard exparte and service hereof be dispensed with in the first instance.**
- b. **That the honourable court be pleased to issue a mandatory injunction compelling the respondents to give the claimant access to his office, remove the padlocks and guards and allow the claimant to proceed with his duties as the managing director of the 4th respondent.**
- c. **A mandatory injunction compelling the respondents to allow the claimant access to the 4th respondent's offices pending the hearing and determination of the claim.**
- d. **That pending the hearing and determination of the application, the honourable court be pleased to issue a temporary injunction restraining the respondents either by themselves, their agents, servants and or employees from interfering with the employment of the**

claimant, as the managing director of the 4th respondent.

e. That costs of this application be provided for.

The respondents opposed the application relying upon the replying affidavits of Gakuhi Chege filed on 29.10.2013, James M. Mugo filed on 29.10.2013 and Gitonga Kabugi filed on 30.10.2013 together with the exhibits attached on the affidavits.

The application was certified urgent and was heard on 30.10.2013.

For the applicant, it was submitted as follows:

- a. The claimant is at all material time the managing director of the 4th respondent.
- b. The 1st respondent being the deputy governor of the 2nd county Government wrote to the claimant the letter dated 10.10.2013 asking him to step aside in view of the complaints received by the 2nd respondent from the staff of the 4th respondent. The letter to step aside required the claimant to handover the office to the commercial manager, one James Mugo Macharia and to keep off until further notice. It is the claimant's case that the 1st respondent lacked the authority to issue the letter; the stepping aside until further notice amounted to a pretended and illegal termination; and stepping aside was a terminology unknown in employment law.
- c. The 3rd respondent lacked authority to issue the notice **JMT V** alleging a board meeting held 11.10.2013 had directed that the claimant steps aside and that the meeting had appointed the commercial manager, James Mugo Macharia acting managing director. It was submitted that the notice was the 3rd respondent's personal directive without the board meeting and resolving accordingly. The claimant relied on the letter of 17.10.2013 **JMT VII** by the 4th respondent's chairman Bishop Luigi Paiaro to the 2nd respondent's Governor confirming that the meeting of 11.10.2013 had been cancelled. The chairman had by the letter dated 17.10.2013 being **JTM X** asked the claimant to resume duty but the respondents had ensured that he does not resume duty by locking him out of the office.
- d. The claimant's 3 years contract is due to lapse on 13th January, 2014 and as per the contract **JTM III**. The contract provides for renewal subject to the claimant meeting the performance targets as agreed with the 4th respondent's board; sustaining suitability in all respects; and if claimant is keen to continue serving in the office.
- e. The claimant therefore prayed that he be allowed back into the office by the court allowing the application because the respondents were proceeding in breach of the contract, unfairly and unlawfully to terminate his employment.

For the respondents, it was submitted as follows:

- a. The claimant has misled the court by alleging that he had been forcefully and illegally removed from employment. All the stepping aside meant was a suspension for three weeks to allow investigations as per the letter dated 23.10.2013 by 3rd respondent being **JMM 8** on the affidavit of James M. Mugo. The matters to be investigated included the failure by respondent to involve 2nd respondent in running the 4th respondent and financial and personnel mismanagement. In view of the misleading pleading, the equitable remedy of injunction should be denied.
- b. The 4th respondent's Board had ratified the decision by the 1st respondent to require the claimant to step aside at the meeting of 11.10.2013. The decision to step aside was therefore lawful.
- c. It was valid for the claimant to step aside pending the investigations. He will be on full pay and benefits; his term of service was coming to an end and he could proceed on a paid up leave; he

will not suffer any irreparable injury or loss; and in any event any injury could be paid up in compensation.

- d. The respondents submitted that a mandatory temporary injunction could only issue in special circumstances where the matter had to be decided only once as was held in **Kenya Breweries Limited -Versus- Okeyo (2002)1 EA 101 (CAU)**.

The court has considered the affidavits and the attached exhibits and makes the following observations:

- a. Under the contract of employment between the parties, there was a clear renewal clause and termination clause. Throughout the contract, there was no reference to stepping aside as a mechanism to investigate alleged misconduct or to circumvent the renewal procedure as was submitted for the respondents. Indeed, stepping aside is a term and idea unknown to our labour and employment legislation. The court holds that in absence of an agreement between the claimant and the 4th respondent on the meaning and execution of the so called stepping aside, the respondents' actions amounted to breach of the contract of employment. The court holds that no party to the employment contract can unilaterally vary the terms of the contract to the detriment of the other party. Thus, under section 10(5) as read with section 13(1) of the Employment Act, 2007 where the terms and conditions of employment are to change, the employer must consult the employee and notify the employee about such changes. Further, section 12 of the Act requires the employer to notify the employee about the applicable disciplinary rules. The court holds that an employer cannot invoke disciplinary rules and procedures that were not notified to the employee. In the present case, stepping aside was not a disciplinary rule notified to the claimant by the 4th respondent and the court finds that it was not a legitimate disciplinary process.
- b. Resolutions of the meeting of the 4th respondent held on 23.10.2013 being exhibit **CGC 5(b)** on the affidavit of 3rd respondent show that it was resolved that the claimant was to be asked to step aside for three weeks; the position of the managing director of 4th respondent be advertised; investigations to commence in a week's time; and the claimant to take outstanding leave days since his contract was coming to an end.

In **Giella –Versus- Cassman Brown & Company Limited (1973) E.A 358**, the court held that an applicant for an injunction like the claimant in this case must show a *prima facie* case with a probability of success; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and when the court is in doubt, it will decide the application on a balance of convenience.

The court has found that the respondents have invented and invoked a disciplinary procedure that was not agreed upon by the parties to the contract of employment, namely stepping aside; the respondents under the stepping aside procedure have moved to design to deny the claimant a chance to renew his contract of employment as otherwise stipulated in the agreement; the respondents have designed to preempt any genuine disciplinary procedure by resolving that the claimant should take a terminal leave; and the respondents are proceeding in total disregard of the contract and the provisions of the Employment Act, 2007. In the circumstance of the case, the court finds that the claimant has established a *prima facie* case with a probability of success. The respondents appear engaged in surreptitious designs and schemes to deny the claimant the benefit of the agreed renewal clause and a fair or genuine disciplinary process. Such, in the opinion of the court amounts to irreparable injury beyond the remedy of damages. The court finds that the claimant is entitled to the temporary injunction in such special circumstances that invite protection of due process and freedom of the parties to contract and uphold the contractual terms and conditions. While making the findings, the court has considered that the claimant is a public officer and the respondents are bound by Article 236 of the Constitution that entitles the claimant to due process in event of removal, dismissal or imposition of any punishment in view of the public office he holds.

In conclusion, the application is allowed and the court makes the following specific orders:

- a. That pending the hearing and determination of the suit, the respondents shall by themselves or by their agents or employees give the claimant access to his office, remove the padlocks and guards and allow the claimant to proceed with his duties as the managing director of the 4th respondent.
- b. That pending the hearing and determination of the suit, the respondents shall by themselves or by their agents or employees allow the claimant access to the 4th respondent's offices.
- c. That pending the hearing and determination of the suit, the respondents either by themselves, their agents, servants and or employees are prohibited from interfering with the employment of the claimant, as the managing director of the 4th respondent, and the procedure known as stepping aside and all resolutions made by the respondents under that procedure are stayed until the determination of the suit.
- d. The officer commanding the Kenya Police Service at Laikipia County is directed to enforce and ensure the compliance with the court orders as made.
- e. The respondents shall pay the costs of the application.

Signed, dated and delivered in court at **Nakuru** this **Friday, 1st November, 2013.**

BYRAM ONGAYA

JUDGE