



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1308 of 2012

CHRISTINE MWAKA PEKESHE..... CLAIMANT

VS

MOMBASA WATER SUPPLY AND SANITATION COMPANY LIMITED
.....RESPONDENT

RULING

The application before court is the one dated 1st August, 2012. It is filed through a Notice of Motion brought under certificate of urgency. The applicants seek orders as follows:

1. *That this Applicant be certified urgent.*
2. *That service of this Application be dispensed with at the first instance.*
3. *That pending the hearing and determination of this suit this honourable court may be pleased to issue a temporary injunction restraining the Respondent, its employees, servants or agents from selecting, recruiting electing and/or appointing and person(s) or individual(s) to the position of General Manager Human Resource and Administration.*
4. *That costs of and occasioned by this Application be provided for.*

The application is grounded on the reasons that:

1. *The claimant is employed on three (3) year contract with the Respondent as Head of Human Resources and Administrative Services.*
2. *That on 11th day of July 2012, the Respondent placed an advertisement in the Daily Nation Newspaper titled “Exceptional Career Opportunities” seeking to recruit individuals in several management positions including the position of General Manager Human Resources and Administration.*
3. *That the advertised position is the same as the one which the claimant currently occupies under the contract of employment with the Respondent.*
4. *That Respondent’s action in advertising the claimant’s job is contra statute, malicious, mala*

fides and in blatant contravention of the terms and conditions contained in the Employment Contract between herself and the Respondent.

5. *That the said advertisement is in blatant violation of the claimant's rights both under her contract of employment with the Respondent and in law.*

6. *That it is in the interest of justice that this application be heard and determined as matter of urgency failing which the same may be rendered nugatory.*

The application is also supported by an affidavit sworn by the applicant herein Christine Mwaka Pekeshe sworn on 1st August 2012. The Applicant avers that she was employed on a 3 year contract with the Respondent, a copy of which she has annexed to this application as exh MP1. She further avers that on 11th July, 2012, the Respondents placed in the Daily Nation Newspaper several advertisements one advertising the claimant's job with the Respondent.

The Applicant contend that as per the Advertisement, duties of claimant spelt out in the employment contract CMP1 are the same as those key result areas of the job advertised. That duties outlined in the newspaper advert are similar to those in claimant's employment contract. The applicant also contends that her contract is for 3 years with effect from 1st January 2011 and that the advertisement is contrary to the terms and conditions of the employment contract and the advert purports to interfere with that contract.

The Applicant submitted that in advertising for this vacancy the Respondent are acting contrary to Section 5(3) of the Employment Act. They aver that this advert is an attempt to harass the claimant. They aver that if the Respondent is purporting to restructure the Company, this must be done in line with Section 76 of the Employment Act.

The Respondent on the other hand argue that this application is not deserving of any injunction as the claimant has not established a *prima facie* case with likelihood of success. They cite the case of *Giella Vs Cassman Brown & Company Ltd (1973) E.A. 358* and submit that the test of a *prima facie* case with likelihood of success is not established in the current case. The respondents aver that they are desirous of restructuring as an entity and this fact is well known to the claimant. Those consultations were done with management including the claimant and it was agreed that this be done. Minutes of the meeting that reached this decision were annexed as an exhibit. They submit that the claimant was part of the meeting that reached this decision and so was not taken aback with the advertisement.

The Respondents further submit that if the claimant is dismissed there are other remedies she is entitled to. They argue that the balance of convenience tilts towards the Respondent given what was invested in the restructuring. They asked court to dismiss this application.

Having heard submissions of both parties, the issue is whether the Applicant has a *prima* case with likelihood of success to warrant the issuance of an injunction by this court.

The test as cited in the classic case of *Giella Vs Cassman Brown & Company Ltd (1973) E.A. 358* at page 360 where it was stated that:

“First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damage. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”

Having stated that position of law. Does the applicant's case meet this test? First and foremost, the Applicant has established she works for Respondent and that she works in the same capacity as that position intended to be filled. The Respondents aver that this restructuring of the Respondent's Company was done after consultations and the claimant was aware. The Respondent refers court to minutes held on this. Let me quote a portion of the minutes in relation to claimant Applicant's position:-

