



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 156 OF 2020

JOHN MOOGI OMARE.....CLAIMANT

-VERSUS-

KENYA NATIONAL COMMISSION FOR UNESCO.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th June, 2020)

RULING

The claimant filed the memorandum of claim on 13.03.2020 through Musyoki Mogaka & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant has a legitimate and reasonable expectation that his contract would be renewed for a fixed term of four years.
- b) A declaration that failure to communicate the intention not to renew the contract implied that the contract would be renewed.
- c) A declaration that non-renewal of the contract would amount to unfair termination of the claimant's contract of employment.
- d) Costs of the suit.
- e) Interests thereon.

Alongside the memorandum of claim the claimant filed the application by the notice of motion dated 13.03.2020 under Article 41 of the Constitution, sections 43, 45 (4) (b), 45 (5), 46, 47, 49 and 50 of the Employment Act and all enabling provisions of law. The claimant prayed for orders:

- 1) That the application be certified urgent and heard ex-parte in the first instance.
- 2) That pending the hearing and determination of the application and suit inter parties the Honourable Court be pleased to grant an interim order staying the respondent's decision to advertise and thus cancel the advertisement dated 25.02.2020 that has the effect of declaring the claimant's position vacant.
- 3) That pending the hearing and determination of the application and the suit inter-parties the Honourable Court be pleased to grant an interim order extending the claimant's contract dated 02.02.2016.
- 4) That pending the hearing and determination of this application and suit inter parties the Honourable Court be pleased to issue an order restraining the respondent or its agents from making any appointment or conducting any recruitment aimed at substantively filling the position of Programme Director, Culture, Scale 9 KNC9/E1.
- 5) That any other relief that the Honourable Court may deem fit, just and equitable to grant.
- 6) That the costs of the application be borne by the respondent.

The application was based on the attached claimant's affidavit and exhibits and upon the following grounds:

- a) That the claimant was employed by the respondent in the position of Programme Director, Culture, Scale 9 KNC9/E1 for a term of 4 years from 02.02.2016 to 31.03.2020.

b) The respondent on 25.02.2020 advertised the position held by the claimant.

c) The claimant's contract was renewable subject to satisfactory performance. The claimant's appraisal showed satisfactory performance so that he held a legitimate expectation that the contract would be renewed.

d) The advertisement of a vacancy in the position held by the claimant shows the respondent's intention not to renew the claimant's contract of service. The failure to renew amounts to unfair termination. The advertisement amounted to termination of the claimant's contract of service without a written communication or due process. The advertisement and the termination should therefore be stopped by the Court.

The matter was urged before the Court on 13.03.2020 and the Court (Radido J) directed that the application be served for inter-parties hearing on 16.03.2020. It would appear that the Court did not sit on 16.03.2020 (due to the sudden emergency of the Covid 19 situation). Thus the claimant filed on 16.03.2020 another urgent application dated 16.03.2020 essentially repeating the prayers in the application dated 13.03.2020. The matter was before the Court (Ongaya J) on 19.03.2020 and counsel for both parties were present. Counsel for the respondent submitted that the status quo could be maintained and the Court ordered:

1) The application is certified urgent for inter-parties hearing on 30.04.2020 at 9.00am or soon thereafter.

2) Pending inter - parties hearing or further orders by the Court:

a) The applicant to continue in the service of the respondent in the position of Director, Culture; and

b) The respondent by itself or by its officers, agents or members shall stay the recruitment, selection, interview or appointment in the position of Director, Culture flowing from the advertisement of 25.02.2020.

3) Replying affidavit be filed.

4) Costs in the cause.

The claimant filed another application on 05.05.2020 alleging disobedience of the orders given by the Court on 19.03.2020. That application will be for further directions after the instant ruling and as earlier directed by the Court on 20.05.2020. On 20.05.2020 the claimant's application dated 16.03.2020 was marked withdrawn or overtaken and the Court directed the parties to file submissions on the claimant's application dated 13.03.2020 and the respondent's application dated 01.04.2020 both of which are subject of the present ruling.

The respondent's notice of motion dated 01.04.2020 seeks to set aside the interim orders and relies upon the replying affidavit of Dr, Evandeline Njoka (respondent's Chief Executive Officer – CEO) sworn on 01.04.2020. It is opposed by the applicant through his replying affidavit sworn on 11.05.2020. Other than the prayer for costs, the respondent has prayed for the order that the Court is pleased to vary and set aside the ex-parte orders made on 19.03.2020 extending the employment of the claimant in the office of Programme Director Culture in the respondent; and staying the recruitment, selection and interview or appointment in the office of Director Culture flowing from the advertisement of 25.02.2020. It is urged for the respondent as follows:

a) The claimant was employed by the respondent and his 4 years' contract that ran following appointment on 02.02.2016 was lapsing on 30.03.2020. The claimant applied on 16.09.2020 for the contract to be renewed. The Board considered the application for renewal but declined the same because the claimant failed to make out a case for the renewal.

b) It was not true that the claimant was not informed of the outcome of his application for renewal but he was informed verbally and then in writing by the letter dated 11.03.2020 and prior to filing the present case.

c) It was denied that the applicant had performed satisfactorily. Clause 26 on renewal of the contract stated thus, "**At the end of your tenure, should you wish to be reappointed in the same position you will be required to make a written request at least six (6) months before the expiry date of this contract.**" The claimant was mistaken to urge and submit that the clause granted him an automatic renewal.

d) Further, clause 2.19.2 of the respondent's HR Manual provides that where an office is to be filled other than for common establishment posts, the Board or the Secretary General or CEO shall invite the applications through external advertisement. However, a vacancy need not to be advertised where the Secretary General or CEO, or Board is satisfied that the vacancy should be filled by the appointment or reappointment or re-designation of an employee so as to achieve better efficiency and effectiveness in the organisation. The respondent urged that the provision as well as clause 26 of the letter of appointment did not entitle the claimant to a renewal and it was clear that the Board had to decide one way or the other. Further it was not true that the renewal was contractually based on the claimant's performance and that his alleged good performance (which is denied) entitled him to the renewal as urged for him.

e) Thus there was no established contractual basis for renewal of the contract and based on the claimant's performance.

f) The claimant's application for renewal of the contract meant that the Board had a discretion to renew or not to renew the contract.

g) The interim orders should be discharged because under Rule 17 (10) of the Employment and Labour Relations Court (Procedure) Rules the court cannot grant an ex parte order which reinstates an employee whose service has been terminated.

The Court has considered the parties' respective cases in the two applications and the respective submissions. The Court makes findings as follows.

First, in cases urging the Court to intervene in the performance of human resource functions by the employer the Court is guided by its opinion in Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR thus, **"The principles are clear.**

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

In the instant case and as urged for the respondent, clause 26 of the letter of appointment provided for possibility of a renewal and further clause 2.19.2 of the respondent's HR Manual vested in the Board the discretion to appoint by way of a reappointment or by open advertisement. The material on record show that the claimant appears to have been informed about the Board's decision declining his application for renewal. In particular, the letter dated 11.03.2020 by Dr. Evangeline Njoka, MBS was addressed to the claimant and conveyed that the full Board of the respondent during its 47th meeting resolved that the position of Director Culture Programme amongst others, be advertised and concluded thus, **"Therefore, as previously verbally advised during your consultations on the matter on more than one occasion, I strongly encourage you to apply for the position of Director Culture Programme to be considered among other applicants. Thank you."** To that extent, the Court finds that the applicant has not so far shown that the respondent was proceeding in breach of the contract or contravention of statutory or constitutional provision.

Accordingly, the Court returns that in the circumstances of this case the claimant has failed to establish a *prima facie* case to justify the intervention by the court by way of an interlocutory injunction or other interim order stopping or staying the lapsing of the contract or the recruitment and selection process leading to the filling of the accruing vacancy. In Giella -Versus- Cassman Brown & Company Limited [1973] EA 358 at 17 – 20, it was held that in considering to grant a prohibitory injunction, the applicant must show the court a *prima facie* case with a probability of success; if the injunction is not granted, the applicant stands to suffer irreparable harm which would not adequately be compensated by an award of damages; and if the Court is in doubt, then the Court will decide the application on a balance of convenience. In the instant case the Court returns that a *prima facie* case with a probability of success (so as to justify the Court's intervention by way of the remedies as prayed for the claimant) has not been established at all. Thus the Court returns that the claimant has failed to establish the 1st limb of the principles for grant of the remedies in the nature of a temporary injunction.

Second, with respect to the respondent's application, the Court returns that the orders were made in presence of advocates for both parties and the respondent's Advocate had submitted that status quo could be maintained. Further it was misconceived for the respondent to urge that the Court had ordered a reinstatement on 19.03.2020 whereas, as of that date, the claimant was in the respondent's employment, he had not been dismissed and it is not in dispute that the running 4 years' contract was lapsing on 30.03.2020. Indeed, the Court order was that the claimant continues in the service of the respondent in the position of Director Culture and pending the inter-parties hearing of the application on 30.04.2020. Thus the Court returns that it was misconceived for the respondent to invoke Rule 17 (10) of the Employment and Labour Relations Court (Procedure) Rules in the manner it was invoked.

Third, the Court has considered the numerous applications filed and the Covid 19 situation which contributed to the delay in determination of the claimant's initial application. The Court has also considered the effect of the interim orders and the respondent's obvious opportunity to mitigate its situation by assigning the claimant duty while the interim orders were in place. In such circumstances the two applications would be determined with orders that the claimant's last day at work is the date of this ruling and each party to bear own costs of the applications especially in view of the parties' margins of success.

In conclusion the claimant's application filed and dated 13.03.2020 and the respondent's application filed and dated 01.04.2020 are hereby determined in terms of the Court's findings herein with orders:

- 1) The claimant's last day at work with full pay shall be the date of this ruling.
- 2) In view of this ruling the parties to seek to compromise the contempt application filed for the claimant on 05.05.2020 with a view of recording a consent failing, the same to be fixed for mention for further directions.
- 3) Each party to bear own costs of the applications.

Signed, dated and delivered in court at Nairobi this Friday, 5th June, 2020.

BYRAM ONGAYA

JUDGE