



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

CAUSE NO. 2205 OF 2014

RIFT VALLEY RAILWAYS

WORKERS UNION (K)..... CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS (K) LTD..... RESPONDENT

Mr Munai for Claimant/Applicant

Mr Mwenesi for the Respondent

RULING

1. Application dated 11th December 2014 and filed on the same date seeks an order that the Deputy Secretary General's salary for the month of June 2011 to November 2014 together with the bonuses rightfully earned be released to him until the issues in Cause No 672 are heard and determined.
2. The Application is based on the following grounds set onto the face of the Application;
3. That the Claimant/Applicant filed Cause No. 672 of 2014 seeking to stop the transfer of the Deputy Secretary General of the Applicant to Uganda. That interim orders were granted in favour of the Claimant/Applicant and the suit was set for hearing as soon as possible.
4. Meanwhile, the salary of the Deputy Secretary General was withheld from the month of my 2014. Miscellaneous Application No 70 of 2014 was filed to address the salary issue but the Respondent paid out the May salary. The Application was not heard.
5. Application No. 70 of 2014 and Cause No 672 of 2014 were consolidated and had not been heard and determined.
6. The Claimant/Applicant avers that the Respondent acted in contempt of court in failing to pay the salary of the Deputy Secretary General as stated herein from June 2014. The Respondent further went ahead to dismiss the Deputy Secretary General when this matter was still pending in Court.
7. That the Deputy Secretary General was a leader of over 800 union members and should not be treated in such dehumanizing manner.
8. That the Deputy Secretary General is being harassed in violation of the constitution for engaging

in union activities. That the Application be granted.

Replying Affidavit

9. The Respondent filed a replying affidavit deposed to by M/s Grace Wamiti the Human Resource Business Partner (Employee Relations) at the Respondent company.
10. She denies that the Respondent has withheld the salary of the Deputy Secretary General of Rift Valley Railways Union for the months of June to November 2014.
11. That in Industrial Cause No 672 of 2014, Hon. Nzioki Wa Makau J delivered a ruling on 17th June 2014 on the issue of transfer to Uganda of the Deputy Secretary General and ordered that Mr David Ogega Onditi to take up his new position in Uganda.
12. That the Deputy Secretary General Mr David Ogega Onditi has never reported back to work and he did not take up the position in Uganda.
13. That the Chief Human Resource Officer of the Respondent wrote to Mr David Ogega Onditi requiring him to show cause why disciplinary action should not be taken against him in accordance with section 44(4) (a) of the Employment Act 2007 and the Company's code of conduct Clause 4.01.1.
14. The notice is dated 27th June 2012 and is annexed to the Replying Affidavit and marked 'GW2'. The Deputy Secretary General did not respond to the show cause letter and his services were terminated by the Chief Human Resource officer by a letter dated 7th July 2014, annexed and marked 'GW3'
15. That the Deputy Secretary General is not entitled to payment of any salary at all for the period from June to November 2014. That he failed to follow a lawful order to take up his position in Uganda and his employment was lawfully terminated.
16. The interlocutory remedy sought is ill conceived and the Application should be dismissed with costs.

Determination

17. The onus of proving a *prima facie* case with a probability of success is on the Applicant who seeks the relief. For the Applicant to establish that the Deputy Secretary General, Mr David Ogega Onditi, deserves salary for the period June to November 2014, the Applicant must show on a balance of probability that Mr David Ogega Onditi provided service to the Respondent for the period and has not received salary for the work done.
18. The court has perused the Ruling of Nzioki wa Makau J delivered on 17th June 2014 in which he found as follows;

"In the premise as the employee acceded to his transfer and pocketed the allowance for his transfer the Application is not fit for grant and the same is dismissed with costs. The suit should be set down for hearing as soon as possible. The Respondent should facilitate the movement of the Claimant's member to Uganda to take up his new position as directed"
19. The Court is not satisfied that the employee presented himself to the Respondent premises to be facilitated to travel to Uganda. The Applicant has come to equity with dirty hands having been granted relief by the court which it did not take advantage of.
20. The Deputy General Secretary Mr David Ogega Onditi has since been dismissed from the

employment of the Respondent. whether or not the dismissal was for a valid reason and whether it was effected in terms of a fair procedure is a matter for determination by the Court if a proper suit is filed by the employee with regard to the dismissal that took place on 7th July 2014.

21. The memorandum of claim filed together with the application on 11th December 2014 does not address at all the issue of dismissal and in fact no relief is sought in the said memorandum of claim.
22. This is another example of abuse of the process of the court by the Applicant, in filing a hollow memorandum of claim in support of the Application.
23. In the said memorandum of claim the claimant make unsubstantiated derogatory remarks against Hon. Justice Makau under paragraph (h) in a manner which in the court's view is contemptuous of this court.
24. This sought of conduct by a litigant who seeks equity and justice from the court is counter productive to say the least.
25. Having said that and in light of the failure by the Claimant/Applicant to establish a *prima facie* case for the relief sought coupled by the fact that no substantive relief is sought in the memorandum of claim dated 11th December 2014, the Application and the substantive claim are dismissed with costs to the Respondent.

Dated and Delivered at Nairobi this 25th day of September 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE