



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 19 OF 2011

JACKSON KIMANI WAWERU.....	1 ST
PLAINTIFF/APPLICANT	
DANIEL KAGORI NJUGUNA.....	2 ND
PLAINTIFF/APPLICANT	
BENJAMIN CHETEREK KIMENGICH.....	3 RD
PLAINTIFF/APPLICANT	
DAVID KARIMI MARETE.....	4 TH
PLAINTIFF/APPLICANT	
PATRICK GAKOBO MATHENGE.....	5 TH
PLAINTIFF/APPLICANT	
HASSAN GODANA BAGAJA.....	6 TH
PLAINTIFF/APPLICANT	
VERSUS	
ATTORNEY GENERAL KENYA.....	1 ST
DEFENDANT/RESPONDENT	
COMMISSIONER OF POLICE.....	2 ND
DEFENDANT/RESPONDENT	
SHADRACK MULANGA.....	3 RD
DEFENDANT/RESPONDENT	
MUNICIPAL COUNCIL OF NAIVASHA.....	4 TH
DEFENDANT/RESPONDENT	

RULING

The Applicants were former employees of the 4th Respondent the Municipal Council of Naivasha, (*the Council*). The 3rd Respondent was a former Town Clerk of the Council. The 2nd Respondent and 1st Respondent are enjoined as officers charged with the advice to the Government and enforcement of law and order respectively.

The Applicants sued the Respondents in the Principal Magistrate's Court in Naivasha Civil Case No. 1001 of 2009 and, from the terms of the Consent Order dated 17th September 2010, for *inter alia*, payment of their half salary while on suspension.

The Council paid the 5th and 6th Applicants but not the 1st - 4th Applicants. Aggrieved with the Council's refusal to pay their half salary, the Applicants filed, through Katunga Mbuvi & Co. Advocates, a Notice of Motion dated 27th January 2011 in which the Applicants seek two prayers -

(1) to commence contempt proceedings against Michael Kimwele being the Town Clerk and Wilson Mungai being the Town Treasurer of the Defendant Council, and

(2) that the Defendants Michael Kimwele and Wilson Mungai be committed to civil jail for a term not exceeding six months and/or be fined for contempt of court, and

(3) costs be provided for.

The Applicants' case as set out both in the grounds of the Motion, the Supporting Affidavit of the 1st Applicant (sworn on 27th January 2011), and subsequently urged by their counsel, Mr. Mbuvi, is that, despite the court order directing the 4th Respondent to pay the Applicants their respective half salary, the Defendants have declined and/or refused and ignored the said court order and that the Applicants have not been paid, and that unless the Town Clerk and Town Treasurer are committed into civil jail they cannot have the respect for the court.

The 4th Respondent, (*the Council*) denied the Applicants' contention. In the Replying Affidavit sworn on 4th May 2011, one Michael Kimwele, the Town Clerk to the Council avers that neither he as the Town Clerk, nor the Treasurer had refused to make payment "**relevant and rightful persons entitled to half pay among the Plaintiffs/Applicants. The new Town Clerk gives reasons why "there are no relevant and rightful persons entitled to half pay."** The Town Clerk states in paragraph 5 of his Replying Affidavit that the 1st Applicant having been transferred by the Ministry of Local Government, is no longer an employee of the Council. **Secondly**, the 2nd Applicant who is also under suspension is not entitled to any pay since "**he has a pending criminal case in Naivasha Principal Magistrate's Court Criminal Case No. 360 of 2009, and consequently does not qualify for any such half pay, under the terms and conditions of service under the Public Service Commission (Local Authority Officers) Regulation 2007.** **Thirdly**, the 3rd Applicant was retired in the public interest on 22nd December 2009 and that he is neither qualified nor entitled to any half pay.

Fourthly, the 4th and 5th Applicants who were genuinely entitled to half-pay, have been paid their dues. **Fifthly**, the 6th Applicant was summarily dismissed and that he is not entitled to any half pay.

The Applicants' Supplementary Affidavit sworn on their behalf by Jackson Kimani Waweru, the 1st Applicant, failed to address any of the Council's grounds stated, and engaged in irrelevancies as to the Applicants' differences with the former Town Clerk of the Council. The said Affidavit is, for the purposes of the application herein, and this Ruling, scandalous, irrelevant and oppressive and is struck out.

The issue before this court is therefore whether in the circumstances described in the Replying Affidavit of Michael Kimwele, the Council's current Town Clerk the prayers sought by the Applicants' whether jointly or severally are justiciable.

My answer to that issue is that the Applicant's prayers for leave to commence contempt of court proceedings are not justiciable.

In my understanding of the law relating to public service employees, suspension is a first step in the disciplinary process, pending investigations. While under suspension an employee or officer is entitled to half pay. That is the effect of Regulation 30(a) of the Council's Terms and Conditions of service. Where however criminal proceedings follow while under such suspension the officer may not be entitled to any such pay until the criminal proceedings are concluded (Regulation 30(b)). There is Naivasha PMC Cr. Case No. 360 of 2009, pending against the 2nd Applicant.

Where suspension is followed by further action such as dismissal from the service, the concerned officer's remedy is to challenge the terms or conditions or legality of his dismissal. This is because his dismissal arises directly from the reasons of his suspension in the first place.

An employee, who is suspended and is in the course of such suspension transferred to another station in the same or senior capacity, clearly means that the suspension is put to an end and the question of payment or non-payment is at an end. The officer is fully restored to his former position.

Lastly the retirement in the public interest is the employer\'s (*or Council\'s*) final act following the suspension. The remedy of an employee who is so retired is to challenge the legality or appropriateness of his retirement in the public interest, or whether he has any rights following retirement on such ground.

Perhaps the last issue herein is whether the remedy of contempt of court is available against subsequent office bearers of a Council or other body where there has been a change of guard.

Contempt proceedings are criminal in nature. They attach to a person not an office. For example if a company is indicted with a criminal offence, the charge is usually against the company and its Chief Officers. Where, as in the instant case, the indictment is against officers, of a Local Authority, such as the Council, the contempt proceedings are against the officer then sitting or occupying the office of the Council when the orders were made or issued.

In the instant case, the contested orders, which for all the reasons given above are no longer valid, were given during the regime of officers who are no longer with the Council, and if the orders sought were to be granted, the Applicants would need to serve the current officers with the orders to pay and if they refused, then seek an appropriate remedy against them.

In this case, the Applicants have neither sought to serve the new officers with the orders of 17th September 2010, nor sought to enjoin them in the matter by way of an amendment to the application.

For those reasons, I find no merit in the Applicants\' Notice of Motion dated 27th January 2011 and the same is dismissed with costs against the Applicants.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 13th day of October 2011

M. J. ANYARA EMUKULE
JUDGE