



**Mtange & 2 others v (Fao & another; Ministry of Foreign Affairs (Third party)  
(Cause 36 of 2020) [2024] KEELRC 437 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 437 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 36 OF 2020  
M MBARŪ, J  
FEBRUARY 29, 2024**

**BETWEEN**

**JENIPHER MNAMO MTANGE ..... 1<sup>ST</sup> CLAIMANT  
RITAH NANGILA WAFULA ..... 2<sup>ND</sup> CLAIMANT  
ZIPPORAH MORAA RIOBA ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**FOOD AND AGRICULTURE ORGANIZATION (FAO) ..... 1<sup>ST</sup> RESPONDENT  
WORLD FOOD PROGRAMME (WFP) ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MINISTRY OF FOREIGN AFFAIRS ..... THIRD PARTY**

**RULING**

1. The 2<sup>nd</sup> respondent herein, World Food Programme (WFP) filed application dated 15 December 2023 through the office of the Attorney General under the provisions of Article 159 of *the Constitution*, Section 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Order 45 rule 1, Order 51 rule 1 and seeking for orders that;
  1. Spent.
  2. Spent.
  3. The court be pleased to issue temporary injunction restraining the claimants, their servants, agents and or any person dating for and on their behalf from disposing and or selling the 1<sup>st</sup> and 2<sup>nd</sup> respondents attached good pending the hearing and determination of this application.



4. This court be pleased to review, vary and or set aside the proceedings, judgment, decree, attachment, execution and any other consequential orders issued by this court against the respondents.
5. Costs of this application be provided for.
2. The application is supported by the Supporting Affidavit of Dr. Korir Sing'oei, the Principal Secretary, State Department for Foreign Affairs and on the grounds that the claimants Amended Memorandum of Claim dated 3<sup>rd</sup> June 2022 against WFP for unlawful termination of employment. the matter proceeded for hearing on 6 July 2023 and the court awarded the claimants Kshs. 604,656 each in severance pay. The claimants have commenced execution and obtained Warrants of Attachment after issuing a public notice through print media for sale by public auction on 30 November 2023.
6. In his Affidavit Dr Korir aver that the respondents are autonomous subsidiaries of the United Nations and Food Agriculture Organisation and they status governed by Article 105 of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations (the General Convention and the Convention on Privileges and Immunities of Specialised Agencies) to which Kenya is signatory having acceded to it without reservations on 1<sup>st</sup> July 1965. Under Article II, section 2 of the General Convention, all property and assets of United Nations and its agencies enjoy immunity from every form of legal process except in so far as any case where immunity is waived.
7. Under Article III, Section 4 of the Convention provides that the property and assets of the specialised agencies including property held by the respondents enjoy immunity.
8. The claimants commenced execution against the property and assets of the respondents contrary to Article II, Section 2 of the General Convention and Article III, Section 4 of the Specialised Agencies Convention. The claimants were paid severance as follows;
  - a. Jenipher Mnamo Mtange Kshs. 1,145,694.30;
  - b. Ritah Nangila Wafula Kshs. 1,197,842.79;
  - c. Zipporah Moraa Rioba Kshs. 1,354,997.09.
9. The claimants failed to disclose such matters in court and are guilty of material nondisclosure that they had received severance pay and instead proceeded to seek to unlawfully execute against the respondents. The orders sought should issue to avoid loss and damage in view of the commitments under the various international conventions.
10. The claimants filed a reply through the Replying Affidavit of Jenipher Mnamo Mtange the 1<sup>st</sup> claimant and who aver that the court delivered judgment on 6 July 2023 in favour of the claimants directing the respondents to pay them Kshs. 604,656 each. On 19 July 2023 the claimants issued notice to the respondents to pay the award. On 28 September 2023 the claimants served their bill of costs and on 18 October 2023 served the Decree and Certificate of costs but the respondents have failed to pay.
11. The respondents failed to settle the decretal sum leading to the claimants obtaining Warrants of Attachment through M/S Ndutumi Auctioneers on 27 October 2023 and who proclaimed the property of the respondents per the court Decree.
12. On 15 January 2002 the Government of Kenya entered into a basic Agreement with the 2<sup>nd</sup> respondent and Article II of Section 2, the WFP agreed to be subject to the jurisdiction and in particular with regard to contracts and institution of judicial proceedings. Under the basic Agreement Section 26(b)



the 2<sup>nd</sup> respondent agreed that its officials were to cooperate with all Kenyan authorities to facilitate the proper administration of justice.

13. The claimants should not be denied the fruits of their judgment contrary to what Dr Korir has averred in his Affidavit. The Hon. Ambassador Macharia Kamau, then Principal Secretary at the Ministry of Foreign Affairs sworn a Replying Affidavit on 11 October 2022 and confirmed to this court that the 2<sup>nd</sup> respondent can be sued. The cause of action took place in Kenya and the claimants herein being citizens have a right to secure their rights in Kenya and this court has jurisdiction to hear and determine this matter. The application should be dismissed with costs and the claimants allowed to proceed with execution.
14. Both parties attended and made oral submissions.
15. Under Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016 (the Court Rules)* a party is allowed to move the court for a review of its orders for good cause. These provisions are largely similar to Order 45 rule 1 of the Civil Procedure Rules which give the court discretion to review its orders for good cause. These provisions allow the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
16. An applicant seeking for a review of the judgment herein under the Court Rules, must demonstrate sufficient reason;
33.
  - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
    - (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
    - (b) on account of some mistake or error apparent on the face of the record;
    - (c) if the judgment or ruling requires clarification; or
    - (d) for any other sufficient reason.
17. The respondents have relied on Article 105, Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations (the General Convention and the Convention on Privileges and Immunities of Specialised Agencies) to which Kenya acceded on 1<sup>st</sup> July 1965. However, in considering the entirety of the matter, on 14 October 2022, the Third party and representative of the Government through Ambassador Macharia Kamau filed his Replying Affidavit under the instructions of the office of the Attorney General. Ambassador Kamau in addressing the application of the privileges and immunities granted to the respondent and the operation of the Basic Agreement granted to UN Food and Agricultural Organisation (FAO) on 24 November 1961, under paragraph (9) thereof aver that;
18. The above sections directly imply that the Basic Agreement recognises that WFP has juridical personality and as such can sue and be sued. Further, that the WFP is expected to observe Kenyan employment and labour laws, particularly as relates to the staff recruited locally. The three claimants herein are Kenyan citizens who were locally recruited locally.



20. This remains the record of the court. Dr. Korir in his Supporting Affidavit to the instant application does not address these averments by Ambassador Kamau.
21. At the core of the application herein is that the claimants were awarded severance pay but failed to disclose the fact that they had been paid such dues. these facts are not gone into by the claimants in the Replying Affidavit.
22. I take it, Jenipher Mnamo Mtange was paid Kshs. 1,145,694.30; Ritah Nangila Wafula was paid Kshs. 1,197,842.79; and Zipporah Moraa Rioba was paid Kshs. 1,354,997.09. The court awarded each claimant Kshs. 604,656 each. What they had received from the respondent was over and above and these facts were not disclosed to the court during the hearing.
23. Material non-disclosure is a serious impediment to justice. This go to the heart of justice. Material non-disclosure is a serious issue which, once the court is made aware of it, would lead to the setting aside and discharge of an order obtained forthwith. Good faith is so central in any judicial proceedings that a party who approaches the court in the absence of the other party must be absolutely truthful as held in *Gabriel Kariuki Gitonga & 2 others v Redken Wells Ltd & 11 others* [2021] eKLR that;
24. It is perfectly well settled that a person who makes an ex-parte application to the Court that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it.
25. The averments by the respondents taken into account, the claimants had an obligation to disclose all material facts to their claims including the payment of severance pay based on the principle of utmost good faith. Non-disclosure of material facts amounts to coming to court with unclean hands and which entitles the respondents to an order of review and ward in the judgment for payment of severance pay. In the case *Standard Limited v Alfred Mincha Ndubi* [2018] eKLR, the court underscored the importance of full disclosure of material facts and in finding the applicant guilty of non-material disclosure, held that
26. In this case, I find that the applicant is guilty of material non-disclosure and abuse of the court process. It has not approached the Court in good faith and appears to being playing a cat and mouse game with the court process. Such conduct cannot be countenanced by this court and the court cannot exercise its discretion in favour of such a party
27. Application dated 15 December 2023 is hereby allowed and the judgment, decree, attachment and execution proceedings hereby set aside. The Order to pay severance pay on the evidence that the claimants have since received Kshs. 1,145,694.30; Ksh. 1,197,842.79; and Ksh. 1,354,997.09 each in severance pay is hereby vacated. Each party bears own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF FEBRUARY 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

