



Guantai & 8 others v Sokowatch Limited t/a Wasoko; Maxab Limited (Interested Party) (Cause E076 of 2024) [2024] KEELRC 1430 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1430 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E076 OF 2024
NZIOKI WA MAKAU, J
JUNE 11, 2024**

BETWEEN

DENNIS KIMATHI GUANTAI & 8 OTHERS CLAIMANT

AND

SOKOWATCH LIMITED T/A WASOKO RESPONDENT

AND

MAXAB LIMITED INTERESTED PARTY

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated March 25, 2024 seeking for Orders that the Honourable Court be pleased to review, set aside and/or lift the *ex parte order* issued on March 20, 2024 and to issue such further Orders as it may deem fit, appropriate, and expedient to grant in the circumstances of this matter for purposes of expeditious disposal of this suit or other just consideration. The Application was premised on the grounds set out therein and supported by the Affidavit of Mr. Roy Masamba dated March 26, 2024
2. According to the Applicants, in obtaining the fresh Interim Order, the Claimants herein have failed, neglected and/or declined to disclose to this Court material facts including but not limited to the following:
 - a. That the Claimants have repeatedly absconded themselves from duty on diverse dates from the date of receipt of the Interim Order of February 1, 2024;
 - b. That following the 1st to 8th Claimants' absenteeism/abscondment from duty at their work stations, the Respondent issued to them a reminder via email on February 19, 2024 for them to report to their work stations;



- c. That following the continued absenteeism/abscondment from duty, the Respondent issued the 1st to 8th Claimants with Show Cause Letters dated March 4, 2024 seeking an explanation for their absence;
 - d. That the Respondent did not issue new/fresh redundancy notices to the 1st, 2nd, 3rd, 5th, 6th, 7th and 8th Claimants as alleged;
 - e. That the Respondent relied on the Notice of Intention to Declare Redundancy issued on December 5, 2023 and, following the expiry of the Interim Order on March 12, 2024, it issued a subsequent Notice of Redundancy dated March 12, 2024, which essentially rendered the positions of the 1st, 2nd, 3rd, 5th, 6th, 7th and 8th Claimants abolished by operation of the law;
 - f. That on or about March 12, 2024, the 1st, 2nd, 3rd, 5th, 6th, 7th and 8th Claimants received their redundancy dues including basic pay, leave pay, notice pay, and severance pay, which they continue to hold onto and benefit from. That notably, none of them have disputed, or reimbursed the same even as they sought the restoration of their interim orders;
 - g. That the 4th Claimant is still in the Respondent's employment as the consultative period applicable to him is yet to be finalized;
 - h. That on or about March 12, 2024, the 1st, 3rd, 5th, 6th, 7th and 8th Claimants cleared from the Respondent which entailed the surrender and handover of the Respondent's equipment and belongings; and
 - i. That upon request of some of the Claimants declared redundant, which application the Respondent accepted, purchased their work laptops from the Respondent.
3. The Applicant argues that Rule 17(10) of the [ELRC Rules](#) provides that this Court shall not grant an *ex parte order* that reinstates into employment an employee whose services have been terminated. That the import of the fresh Interim Order thus constitutes an *ex parte order* whose effect is to reinstate the 1st, 2nd, 3rd, 5th, 6th, 7th and 8th Claimants into employment despite the lawful and procedural declaration of redundancies by the Respondent. That due to the misrepresentation of facts and material non-disclosure by the Claimants, this Court may have unintentionally acted contrary to the [Rules](#) in issuing the fresh Interim Order that amounted to an *ex parte* reinstatement order. It was Mr. Masamba's averment that the Respondent is gravely prejudiced by the fresh Interim Order which did not consider the Respondent's financial situation and that the Claimants have not demonstrated any *prima facie case* to warrant grant of the said order and/or any injunctive orders. He further stated that the claimants have not suffered irreparable harm which cannot be compensated by an award of damages and that the Respondent's Application has been brought before this Honourable Court in a timely fashion.
4. In response, the Claimants opposed the Respondent's Motion Application through a Replying Affidavit sworn by their advocate, Mr. Paul Kiriinya Gituma on April 22, 2024. Mr. Gituma averred that the Order dated March 20, 2024 applied to all the claimants and was not subjective to the 1st, 2nd, 3rd, 5th, 6th, 7th and 8th claimants as averred. That the 4th claimant entered into Mutual Separation Agreement dated April 1, 2024, which was 16 days after the extension order had been issued and that the said Agreement stated that the 4th claimant was declared redundant on March 29, 2024. That this therefore meant that when the extension order was issued, the 4th claimant was still under the employment of the respondent. Mr. Gituma further averred that it was contemptuous of the respondent to reactivate a potentially flawed process that is subject to litigation and despite knowing that the same had been halted by an Interim Order. That the issuance of notices of redundancy and payment of terminal dues was in bad faith and without substantive legal backing and that all actions



and/or omissions by the Respondent from February 1, 2024 are in contempt of the Interim Order, null and void, and not fit for determination by this Court.

5. It was Mr. Gituma's averment that the Respondent's Application herein is frivolous, speculative and does not meet the threshold of reviewing and/or lifting the order issued on February 1, 2024 and extended on March 14, 2024. He contended that the Respondent/Applicant has created an uncondusive environment for the claimants, denied them access to their tools of trade, is in contempt of the Interim Order issued by this Court and has subjectively harangued the Claimants. He stated that the Interim Order issued of February 1, 2024 had no expiration date and that when the matter came up for mention on March 12, 2024, the Court directed parties to regularize their pleadings and file their respective submissions, but did not lift the Interim Order. He argued that the assertion that the Interim Order automatically expired on March 12, 2024 is inapt, improper and against the law and that the Respondent should have addressed the Court on the said March 12, 2024 and requested for the said Interim Order to be lifted. That alternatively, the Respondent could have filed an application to lift, review or quash the Interim Order. Mr. Gituma further argued that the Court did not issue a 'fresh interim order' as alleged but merely extended the Interim Order issued on February 1, 2024 until the ruling date of the Claimants' Application. That lifting the Interim Order as sought in the Respondent's Application would illegitimate the claimants' stay from the inception of the suit. He noted that the Respondent is inviting the Court to overturn the Interim Order which the Respondent contemptuously disregarded on March 12, 2024 without any legal justification. He thus urged this Court to dismiss with cost the Respondent's Application dated March 25, 2024 for being an abuse of the court process.
6. In reply, the Respondent/Applicant filed a 1st and 2nd Supplementary Affidavit both sworn by Mr. Masamba on April 29, 2024. Mr. Masamba averred that on February 5, 2024, this Court extended the *ex parte* Interim Order until March 12, 2024, on which date the claimants did not apply to extend the said order. That in essence, the claimants were not interested in working for the Respondent/Applicant and tactfully wanted to avoid completion of the disciplinary process for gross misconduct that had already commenced and ended in issuance of the redundancy notices. He argued that contrary to the claimants' assertion, the *ex parte* Interim Order was time-bound and interim in nature, demonstrated by how they indeed applied for extension of the same and that the claimants were therefore expected to extend the orders on each appearance. Mr. Masamba noted that considering the 4th Claimant was still in the Respondent's employ, the *ex parte* Interim Order was of no consequence to him and in any event, the 4th Claimant had since confirmed his willingness to terminate his employment despite existence of the said interim orders.
7. The Applicant further averred that the Claimants' replying affidavit has not provided any persuasive and/or acceptable explanation for the repeated abscondment and/or absenteeism from duty by the 1st, 2nd, 3rd, 5th, 6th, 7th, and 8th Claimants, for over 13 working days, after the receipt of the *ex parte* Interim Order. Mr. Masamba asserted that the Respondent/Applicant has complied and continues to comply with the said orders. He reiterated that the Court should consider the Claimants' non-disclosure of material facts and their unclean hands and find that there are sufficient grounds and/or reasons for allowing the Respondent's Application and setting aside of the *ex parte* Interim Orders granted.

8. Respondent/Applicant's Submissions

The Respondent/Applicant submitted that it is unjust for the Claimants to remain on its payroll while they tactfully and voluntarily requested to clear and receive final dues, are no longer employees and their previously held positions no longer exist. It relied on the decision in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR (Civil Appeal 18 of 2013) in



which the Court of Appeal affirmed that that the Courts' discretion to set aside *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. While acknowledging that the Court's discretion to set aside *ex-parte* proceedings must be done upon terms which are fair to both parties, the Respondent/Applicant asked the Court to consider the serious misrepresentation of facts and material non-disclosure by the claimants as highlighted in the Applicant's pleadings.

9. In addition, the Applicant argues that the failure to set aside the court orders of March 20, 2024 would translate to the reinstatement of the claimants to a financially constrained employer and that the practicability of such an order is implausible having regard to the very nature of the Applicant's business. In addition, that the Order is in breach of Rule 17(10) of the ELRC Rules against the reinstatement of employees whose services have been terminated. The Applicant cited the case of Gladys Boss Shollei v Judicial Service Commission (Petition 39 of 2013) [2013] KEIC 1 (KLR) (Employment and Labour) (22 November 2013) (Ruling) in which the court affirmed the position that before a court can exercise its discretion to make an order for reinstatement on a finding of unlawful dismissal, it ought to consider whether it is practicable for the employer to comply with the order. That the said court further noted that a court cannot order reinstatement of any employee to any company even if he may be wrongfully dismissed and that the only alternative remedy in such circumstances is to order payment of compensation.
10. It was the Applicant's submission that the Claimants have approached this Court with unclean hands through their Application dated January 29, 2024. That the claimants' conduct betrays them and does not endear them to equitable remedies as stated by the court in the case of Caliph Properties Limited v Barbel Sharma & another [2015] eKLR. That in the case of John Njue Nyaga v Nicholas Njiru Nyaga & another [2013] eKLR, the Court of Appeal sitting at Nyeri observed that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings. The Applicant's stance is that the claimants were under an obligation to disclose to the court all material facts in their *ex parte* Application as affirmed by the court in Hussein Ali & 4 others v Commissioner of Lands & 7 others [2013] eKLR. It asked the court to consider the foregoing judicial pronouncements and find that the claimants are not deserving of the *ex parte order* and/or any other order on account of their non-disclosure of material facts and their unclean hands. That on the other hand, the Respondent/Applicant herein has displayed that it would be greatly prejudiced if the court does not review the orders dated March 20, 2024 and that the court does grant the orders sought in the Respondent's Application as prayed.

11. Claimants/Respondents' Submissions

The Claimants/Respondents submitted that the Applicant has not explained how the Interim Order expired specifically on March 12, 2024, the same day on which the matter was in Court and no directions were issued to lift the order. That it is trite law that orders continue in place unless they are discharged or varied by a court of law and that Rule 17(7) of the ELRC Rules, 2016 outlines the procedure of lifting interlocutory orders, which procedure the Respondent did not follow. The claimants argue that the Respondent/Applicant was bound to follow the set procedures of lifting the order, as affirmed by the Court of Appeal in the case of Secretary, County Public Service Board & another v Hulbbhai Gedi Abdille [2017] eKLR. That the obligation of parties to obey orders of court was explained in detail by the Supreme Court in Republic v County Government of Kitui, Ex parte Fairplan Systems Limited [2022] eKLR to effect that if one is dissatisfied with an order of the court, the avenues for challenging it are set out in the law and that defiance is not an option.



12. It was the Claimants/Respondents submission that the Applicant is seeking to review and/or set aside the extension order, which essentially corrected the Applicant's mistaken belief that the order expired with the passage of time on March 12, 2024, as opposed to being lifted by an application under Rule 17(7) of the ERLC Rules. The claimants maintain that the Applicant has failed to meet the requirement of reviewing and/or setting aside the extension order and that the court should consider their submission that they have been performing their duties notwithstanding the Respondent/Applicant's uncondusive working environment subjectively directed to them.
13. The Claimants/Respondents further submitted that the Respondent/Applicant's disregard of the interim order is primarily why its Application and the parties herein are before court because substantive directions would otherwise have been given in open court if the Respondent had made such an application to lift the order. That the Respondent/Applicant should thus bear the cost of their Application and for cost to be awarded to the Claimants, who were dragged into the instant Application.

14. Interested Party's Submissions

- . The Interested Party submitted that the principles of setting aside *ex parte orders* were set out in the case of *Shah v Mbogo* [1967] EA 116 to effect that an order will be set aside where it is necessary to avoid an injustice or hardship arising from accident, inadvertence or excusable mistake or error. That courts have held that a litigant who approaches court for an interim relief, and especially *ex parte*, must place all facts before the court, whether the facts are in favour of or against the party as per the case of *Owners of the Motor Vessel "Lillian" v Caltex Oil (Kenya) Ltd* [1989] eKLR. It was the submission of the Interested Party that if the Court finds that the Respondent has proved that the claimants failed to disclose the averred material facts, then the court should set aside the order of March 20, 2024. Secondly, considering that the claimants were paid their terminal benefits, had cleared and handed over equipment in their possession, the 9th claimant left employment on January 4, 2024, and the 4th claimant is willing to terminate his employment, the order of March 20, 2024 should be set aside as it would result to unjust enrichment. The Interested Party relied on the case of *Njoroge v Gitbinji & 2 others* (Environment and Land Appeal E002 of 2023) [2023] KEELC 20799 (KLR) wherein the Court found that Court orders cannot be issued in vain, that orders against a matter overtaken by events cannot be tenable and that allowing a court to make any order with full knowledge that the same cannot be executed will expose the court to ridicule. It was the Interested Party's submission that the Respondent's Application herein should be allowed because it has established that there is a great injustice if the impugned Interim Order remains as is.
15. This habit of parties seeking protection from the court then acting against the very very same protections sought *ex parte* must stop. Before me are claimants who have since obtaining the orders declined to present themselves to work and in the case of one, taken steps to accede to the issue that brought them to court. As the claimants are undeserving of the orders of the court, the same are hereby vacated with directions to the parties to set the matter down for pre-trial directions before the honourable Deputy Registrar of this court to ready the matter for trial. Such steps to be taken within 21 days of today. There will be no order as to costs on the motion before me.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

