



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E462 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

JOHN MUNENE STEPHEN.....CLAIMANT

VERSUS

KENYA WILDLIFE SERVICE.....1ST RESPONDENT

DIRECTOR OF OCCUPATIONAL SAFETY AND

HEALTH SERVICES.....2ND RESPONDENT

RULING

1. By a notice of motion application dated 16th August 2021, filed under certificate of urgency of even date, the Defendant/Applicant pray for orders that:

(i) This matter be certified as urgent and fit to be heard ex parte in the first instance.

(ii) Service upon the Plaintiff/Respondent herein be dispensed with in the first instance on account of the urgency.

(iii) Pending the hearing and determination of this application, the injunctive orders issued by this Honourable Court on 5th July 2021 be stayed.

(iv) The Defendant/Applicant be at liberty to apply for such

further or other orders and/or directions as the Honourable Court may deem fit to grant in the circumstances.

(v) Costs of this application be borne by the Plaintiff/Respondent.

2. The application is expressed under Article 31 and 40 of the Constitution of Kenya 2010, Section 1A, 1B and 63 of the Civil Procedure Act, Order 1, Order 40 and Order 51 of the Civil Procedure Rules and all other powers and enabling provisions of the law.

3. The application is supported by the annexed and undated affidavit of Vincent Makan Samoo and premised on the grounds that: -

a. There exists an order dated 28th June 2021 and issued on 5th July 2021 in favour of the Claimant as against the Appellant following an application dated 31st May 2021 filed by the Claimant, the Court issued ex parte orders inter alia directing the 1st Respondent to pay the Applicant his field allowances and monthly salary from June 2019 until the hearing and determination of the claim.

b. The orders were secured by misrepresentation and should be discharged forthwith.

c. The Claimant absconded duty from 1st June 2019 and is therefore not entitled to any allowances as he has not returned to his duty station since 1st June 2019.

d. The basis upon which the Plaintiff/Respondent obtained ex parte interim orders amount to a gross abuse of this Honourable Court's process.

e. The application has been made without undue delay.

4. Mr. Vincent Makan Samoo depones that the Claimant joined the 1st Respondent on 21st October 2015 after completion of the Rangers' course at the Respondent's Academy at Manyani and was deployed at the Nairobi National Park. That the Claimant sustained an injury on 6th September 2017 and was treated at the Nairobi West Hospital. That Dr. S. O. Otieno's medical report to the 1st Respondent received on 21st November 2018 stated that the Claimant could resume duty and be assigned light duties for a period of six (6) months and the Claimant resumed duty on 31st May 2019.

5. That while deployed at the David Sheldrick Camp, the Claimant did not report on duty on 1st June 2019 and absconded duty as confirmed by the supervisor.

6. It is further deponed that attempts by the 1st Respondent to take the Claimant through a disciplinary process failed because the Claimant disappeared thereafter. That attempts to reach him through the contacts he provided have fallen through which necessitated stoppage of salary since the Claimant was not officially on leave but had refused or neglected to attend to his duties.

7. The deponent states that he has been informed by Counsel and believes the same to be true that under the Wildlife Conservation and Management Act, 2013, the 1st Respondent is a uniformed and disciplined service and if an officer absents himself from duty without leave or just cause, for a period of or exceeding 21 days is treated as having deserted service unless the officer proves the contrary.

8. That the Claimant has breached the terms of employment with the 1st Respondent by absenting himself from his duty station since June 2019 and is thus not entitled to field allowance.

9. That the orders granted on 5th July 2021 be set aside in the interest of justice

10. The certificate of urgency came up on 27th October 2021 and the Court granted the order to stay the orders granted on 5th July 2021 pending the determination of the application and the said order remains in force.

11. By a letter dated 30th September 2021, the Claimant's Counsel wrote to the Direct General of the 1st Respondent demanding compliance with the orders dated 5th July 2021.

12. On 3rd November 2021 when the suit came up for mention, the Claimant was unrepresented. The 1st Respondent's Counsel informed the Court that he served the Claimant on 25th August 2021 but no response had been forthcoming. Counsel prayed that the application be allowed as it was unopposed.

13. The Court noted that the 1st Respondent had not complied with a penal notice and a further mention was slated for 17th November 2021 when both parties were represented.

14. Counsel for the Claimant informed the Court that there were two applications pending determination. One dated 16th August 2021 and another dated 14th November 2021 and both had been served. Counsel also informed the Court that there two court orders dated 5th July 2021 and 27th October 2021 respectively. Counsel sought directions on disposal of the applications particularly reinstatement of the order on the Claimant's salary stayed on 27th October 2021.

15. Counsel urged that the applications be heard simultaneously.

16. Counsel for the 1st Respondent on the other hand informed the Court that the 1st Respondent was supposed to comply with the penal notice dated 30th September 2021 within seven days and the 1st Respondent had dispatched a cheque for Kshs.447,293/= to the Claimant's advocates for salary and field allowance for the Claimant and thus the 1st Respondent had complied with the penal notice.

17. Counsel was in support of the proposal that the two applications be heard simultaneously. The applications were scheduled for hearing on 26th January 2022.

18. On 26th January 2022, for various reasons, none of the Counsels was present for the hearing of the applications. Counsels who held brief had no instructions to proceed but were in agreement with the Claimant's Counsel proposal that the applications be disposed of by way of written submissions.

19. The Court directed that the application dated 16th August 2021 be disposed of by way of written submissions and ruling slated for 21st March 2022.

20. Neither of the parties filed submissions on the application dated 16th August 2021.

Analysis and Determination

21. I have carefully considered the application herein and the supporting affidavit. The single issue for determination is whether the application is merited.

22. It is not in dispute that contents of the supporting affidavit by Vincent Makan Samoo reveals that it is imperative that the factual issues be determined before other interim orders are issued.

23. It is imperative to ascertain the circumstances relating to the Claimant's employment and rendering of services to the 1st Respondent.

24. The 1st Respondent has raised pertinent issues germane to the conduct of the Claimant which cast serious doubt on the propriety of interim orders as a way forward.

25. If the contents of the affidavit on record are true, then it is clear that the Claimant did not disclose certain material facts about his employment status with the 1st Respondent when he sought interim orders on 31st May 2021, facts which in the Court's view might have impacted on the decision made then and may have influenced the Court to stay the orders on 27th October 2021.

26. Similarly, the Court is alive to the dangers of granting orders at the interlocutory stage whose effect is to grant a major relief before the matter before the Court is heard and determined on merit as enunciated in **Olive Mwhaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR**.

27. In a similar vein, the Court of Appeal addressed the issue in **Khetia Drapers Limited v Kenya Union of Commercial Food and Allied Workers [2018] eKLR**.

28. It is equally important to underscore the fact that this is an employment claim whose remedies are predominantly compensatory which is adequately provided for by the law.

29. Finally, and more significantly, the notice of motion application dated 16th August 2021 was unopposed.

30. For the foregoing reasons, the Court is satisfied that the notice of motion application dated 16th August 2021 is merited and is hereby granted as prayed.

31. Costs shall be in the cause.

32. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF MARCH 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE