



**Odep v County Government of Migori & 5 others (Cause E039 of 2022)
[2022] KEELRC 13137 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13137 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E039 OF 2022
S RADIDO, J
NOVEMBER 9, 2022**

BETWEEN

HESBON DIANGA ODEP CLAIMANT

AND

COUNTY GOVERNMENT OF MIGORI 1ST RESPONDENT

MIGORI COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

**COUNTY SECRETARY, MIGORI COUNTY GOVERNMENT 3RD
RESPONDENT**

**CHIEF OFFICER, MEDICAL SERVICES, MIGORI COUNTY
GOVERNMENT 4TH RESPONDENT**

**DIRECTOR OF MEDICAL SERVICES, MIGORI COUNTY
GOVERNMENT 5TH RESPONDENT**

COUNTY ATTORNEY 6TH RESPONDENT

RULING

1. For determination is a Motion dated 19 September 2022 by Hesbon Diang'a Odep (the applicant) seeking orders:
 - i. ...
 - ii. Thatpending the hearing and determination of this application inter-partes, this Honourable Court be pleased to issue an order compelling the 1st Respondent to release the Claimant's salary for the months of January – March 2021 and May 2022 to date.
 - iii. Thatpending the hearing and determination of this suit, this Honourable Court be pleased to issue an order reinstating the Claimant to the payroll.



- iv. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order suspending the implementation of the posting order dated 14th July 2021.
 - v. That the costs of this application be provided for.
2. The main grounds advanced by the applicant in support of the application are that after a strike called by the Kenya Medical Practitioners and Dentists Board was called off around 11 March 2021, he resumed work and reported to work until March 2021, but the Respondents failed to pay his remuneration and when he inquired he was issued with a show-cause notice; that sometime in April 2021, he made a complaint against his supervisor, the 4th Respondent and this led to inhumane treatment and transfer to Migori County Referral Hospital and that though the salary was reinstated in April 2021, it was again withdrawn in April 2022 despite him (the applicant) offering his services.
 3. The 3rd Respondent filed a replying affidavit in opposition to the Motion on 21 September 2022. The County Secretary deposed in the affidavit that the applicant had not been reporting to work consistently, had absconded duty after transfer to Migori County Referral Hospital, and it was suspected he had mental health concerns.
 4. The County Secretary also swore that the applicant's remuneration had been withheld because he had not been reporting on duty.
 5. When the parties appeared for directions on 27 September 2022, the Court directed them to file and exchange a further affidavit and submissions.
 6. The applicant filed a further affidavit (and submissions) on 11 October 2022, and the Respondents filed submissions on 8 November 2022 (should have been filed/served before 31 October 2022).
 7. The Court has considered the Motion, affidavits, and submissions.
 8. Proposed order (ii), as sought by the applicant, was transient and became spent when the Court did not grant it at the ex-parte stage on 20 September 2022.
 9. The Court is therefore only concerned with the twin questions of whether it should grant an order restoring the applicant to the payroll and suspending his posting/transfer order.
 10. A Court confronted with the type of application now under consideration must caution itself not to delve into a determination of disputed facts.
 11. The applicant acknowledges that he was posted to Migori County Referral Hospital but explains that he did not comply with the order because he had a pending/unresolved complaint against the 4th Respondent, who was based at the county headquarters and, therefore, he feared for his safety, hence the failure to comply.
 12. The applicant further asserts that he has been reporting to work at Kehancha Sub-County Hospital (previous workstation).
 13. The Respondents contend that after the transfer/posting, the applicant has not reported for deployment and, consequently, the decision to withhold his remuneration.
 14. The applicant was expected to establish a prima facie case to obtain the orders sought.
 15. The applicant was transferred in July 2021. He moved the Court in September 2022. He admits that he has not complied with the transfer order. He has attempted to give explanations.



16. The Court cannot establish which of the assertions is truthful before the same are tested or interrogated.
17. Using the standard test of prima facie case, irreparable damages, the balance of convenience and the delay in moving the Court, the Court declines to grant the orders sought.

Conclusion and Orders

18. The Motion is dismissed with costs in the cause.
19. The Cause should be progressed to a hearing on the merits.

DELIVERED VIRTUALLY FROM MALINDI, DATED, AND SIGNED ON THIS 9TH DAY OF NOVEMBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For applicant Mr Ojuro instructed by Otieno, Yogo, Ojuro & Co. Advocates

For Respondents Mr Okong'o instructed by Okongo, Wandago & Co. Advocates

Court Assistant N. Oyugi

