



IN THE HIGH COURT OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 613 OF 2018

DR. JOSEPH WAKIBIA.....CLAIMANT

-VERSUS-

JOMO KENYATTA UNIVERSITY OF

AGRICULTURE AND TECHNOLOGY.....RESPONDENT

RULING

1. On 1.4.2019, the parties filed a consent settlement dated 14.3.2019 and the court adopted the same as orders of the court. The import of the said order was that the letter terminating the Claimants employment was withdrawn and he was reinstated to his employment in the position of Senior Lecturer with effect from 1.4.2019 on his previous terms of employment.

2. On 17.6.2019, the Claimant brought the instant application alleging that the Respondent has breached the said consent order by failing to reinstate him to his employment. He therefore, sought the following orders:

(a) That the application be certified as urgent to be heard ex-parte in the first instance.

(b) That this Honourable Court be pleased to find and hold that the Respondent herein Jomo Kenyatta University of Agriculture and Technology through its Vice Chancellor Prof. Victoria Ngumi is in contempt of the said court orders issued herein on the 1st day of April, 2019 aforesaid and to be subsequently committed her to civil jail for a period not exceeding 6 months pending the compliance with the Honourable Court's Order.

(c) THAT this Honourable Court be pleased to deny the Respondents audience in this matter until and unless they purge the contempt of court committed herein.

(d) THAT the Respondents be ordered to pay for the costs of this Application together with accrued interest immediately and upon determination of the Application herein

3. The application is premised on the grounds set out on body of the motion and the Supporting Affidavit sworn by the Claimant on 17.6.2019. In brief the Claimant contended that the aforesaid consent order was recorded on 1.4.2019 in the presence of the Respondent's Advocate but the Respondent failed to comply with the order; that despite request by the Claimants counsel in writing, the Respondent has continued to disobey the order, that court orders must be obeyed unless and until they are varied, discharged or set aside. Further, he contended that the Respondent also failed to pay his accrued salary without any reason or justification.

4. The Respondent opposed the application by filing a Replying Affidavit sworn on 13.3.2020 by her Acting Registrar Administration Dr. Rose Gathu. In brief the affiant deposed that pursuant to the consent order issued on 1.4.2019, the Claimant was reinstated to his employment as a Senior Lecturer effective 1.4.2019 on his previous terms of employment; that he resumed duty on 19.7.2019 and from that time he has been paid all his rightful salary and benefits; that in the affiants' view the application is overtaken by events and the Claimant is not entitled to payment for the period he did not render services to the Respondent. Therefore she denied that the Respondent disobeyed the said court order and prayed for the application to be dismissed for being frivolous, vexatious and an abuse of the process of the court.

SUBMISSIONS

5. The Claimant submitted that the Respondent has admitted that his reinstatement was effective 1.4.2019 but he was reinstated on 19.7.2019. He further submitted that the Respondent has admitted that it did not pay him any salary and benefits for April, May, June and a half of July 2019. Accordingly, he submitted that the Respondent breached the said consent order and continues to do so by failing to pay the

said salary arrears totaling to Kshs. 1,231,670.00.

6. The Respondent submitted that the Supporting Affidavit and the annexed exhibits are incompetent and should be expunged for want of compliance with Rule 9 of the Oaths and Statutory Declaration Rules which require that exhibits to affidavits shall be marked with serial letter for identification and shall be securely sealed under the seal of Commissioner. For emphasis it relied on **Kenya National Union of Nurses v. Kiambu County Public Service & 5 Others[2019]eKLR.**

7. In view of the foregoing observation that the affidavit is defective, the Respondent argued that the application is also defective and ought to be struck out *in limine*.

8. In addition, the Respondent submitted that his application has no merits and it is overtaken by events. According to it, the Claimant has since 19.7.2019 been reinstated to his employment and paid his salary. It further contended that the court order did not provide for payment of salary arrears and dues and as such if the Claimant desired to seek salary arrears and dues, he should have applied to vary the court order. It contended that there is no pay for no work done.

9. It further submitted that the Claimant has not pleaded to precision and proved the alleged breach beyond balance of probability. For emphasis, it relied on **Juliana Mutisya & 2 Others v. National Gender and Equality Commission & Another [2018]eKLR and Mutitika v. Baharini Farm Ltd[1985]eKLR** where the court held that orders of contempt are *quasi* – criminal in nature and are to be made where the case for contempt has been clearly pleaded and proved beyond a balance of probabilities.

10. In its view, it has since complied with the consent court order and the Claimant has not proved the contrary. It, therefore prayed for the application to be dismissed with costs.

ISSUES FOR DETERMINATION

11. It is common ground that the court issued the consent order on 1.4.2019 in which the Claimant was reinstated to his employment on the previous terms of service with effect from the same date. It is also without dispute that the Respondent was aware of the order. It is also not in dispute that the Claimant was not reinstated until 17.6.2019 when he brought the instant application. It is further without dispute that on 19.7.2019 he was reinstated.

12. The issues for determination are:

- (a) Whether Respondent disobeyed the consent order issued by this court on 1.4.2019.
- (b) Whether the application is now overtaken by events.
- (c) Whether the Respondent should be punished for contempt.

DISOBEDIENCE OF THE ORDER

13. The Claimant contended that the Respondent disobeyed the court order by failing to reinstate him to employment with full pay. The Respondent on the other hand, contended that the Claimant resumed duty on 19.7.2019 and has been paid all his salary and benefits for the days worked. It contended that the Claimant is not entitled to any pay for the period before resumption of duty.

14. I have carefully considered the arguments by the two sides and it is clear that the Respondent reinstated the Claimant only after contempt proceedings were commenced herein. The Claimant wrote demand letter on 3.6.2019 and the Respondent acknowledges the said letter in which the Claimant alleged that he was barred access to the work place. The demand letter did not bear any fruit and on 17.6.2019 the claimant brought this application and with court's directions, served the Respondent for hearing on 26.6.2019.

15. On 26.6.2019, Mr. Lutta Advocate appeared for the Respondent and admitted that he had been served a week earlier and sought 14 days to respond to the application. The request was granted and the matter was fixed for hearing on 18.7.2019. As at the said hearing date, the Respondent had not filed any response to the application but instead sought time to attempt amicable settlement. The matter was again adjourned to 9.10.2019.

16. In the meanwhile the Claimant was reinstated on 19.7.2019 as per the Staff Movement Advice dated 19.7.2019 which clearly indicated that the Claimant was reinstated on the said date. The said documents confirms that the Respondent disobeyed the consent order by failing to reinstate the Claimant on 1.4.2019 as per the consent order dated even date.

17. As far as the court order was concerned the reinstatement of the Claimant took place on 1.4.2019 but the Respondent failed to allow the Claimant to resume work until he commenced these contempt of court proceedings. Further, according to the said court order, effective 1.4.2019, the Claimant became entitled to the salary and benefits he was drawing before the rescinded termination. The failure to pay the said salary and benefits from 1.4.2019 to 18.7.2019 amounts to breach of the said consent order. Consequently, I am satisfied that the Claimant has proved the alleged breach of the court order by the Respondent effective 1.4.2019 in the required standard which is beyond balance of probabilities.

OVERTAKEN BY EVENTS

18. Having found that the Respondent is in breach of the consent order issued on 1.4.2019 by failing to allow him resume duty on 1.4.2019

as ordered and further by failing to pay him salary and benefits for 1.4.2019 to 18.7.2019, I dismiss the allegation that the application is overtaken by events. Even if the court was to consider the reinstatement on 19.7.2019 after the contempt proceedings were brought, the same would only be a mitigating factor. Without prejudice to the foregoing, the Respondent persists in its disobedience by refusing to pay the Claimant's rightful salary and benefits for 1.4.2019 to 18.7.2019.

PUNISHMENT

19. Having found that the Respondent disobeyed the court order issued on 1.4.2019 and continues to do so todate, I proceed to cite the Respondent's Vice Chancellor, Professor Victoria Ngumi for contempt of court as prayed.

20. In view of the said mitigating factor, that is the Claimant has since filing the application been reinstated I will defer my sentence by 14 days to enable the Respondent mitigate further by paying the salary and benefits due to the Claimant from 1.4.2019 to 18.7.2019. The matter will be mentioned on 8.2.2021 for sentencing, when the cited contemnor, Prof. Victoria Ngumi shall attend court physically at 11 a.m.

Dated, signed and delivered at Nairobi this 22nd day of January, 2021.

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE