



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1993 OF 2017

MABEL KIBORE.....CLAIMANT

VERSUS

NATIONAL OIL CORPORATION LIMITED.....RESPONDENT

RULING

1. The Claimant filed a Notice of Preliminary Objection to the Respondent's Application dated 21st December 2020 on the grounds:
 - a) That the Applicant has failed to obey the court Order of this court given on 8th November 2017 and has no audience of this court.
 - b) That the Applicant is in violation of Article 41(1) and (2)(a) and (b) of the Constitution of Kenya 2010.
 - c) That the Applicant has violated the Claimant's right to human dignity contrary to Articles 28 of the Constitution of Kenya 2010.
 - d) That the Applicant has subjected the Claimant to slavery and servitude in failing to pay her salary, reinstate her to her position as per the court order and frustrating her endeavours to secure alternative employment.
 - e) That by bringing this application the Applicant seeks to frustrate the Provisions of Article 159(2), (b), (d) and (e)
 - f) That the Applicant is in violation of Article 10(1) and (2) (b) and (c) of the Constitution of Kenya.
2. In opposition and as a response to the preliminary objection, the Respondent filed its Grounds of Opposition stating follows:
 - (i) THAT the Claimant/Respondent's Notice of Preliminary Objection dated 21st January, 2021 is misapprehended, lacks merit, speculative and overtly premature and is tantamount to an abuse of the process of this Honourable Court.
 - (ii) THAT the Right to fair hearing is a constitutional right envisaged under Article 50 of the Constitution of Kenya, 2010 and the same cannot be abrogated at will by the Claimant/Respondent intentionally failing to effect service of process.
 - (iii) THAT it is incorrect for the Claimant/Respondent to claim violation of Articles 41 and 28 of the Constitution of Kenya, 2010 while at the same time abusing the Orders of the Honourable Court issued on 8th November, 2017 by failing to report back to work.
 - (iv) THAT it is pretentious of the Claimant/Respondent to claim violation of Articles 10 and 159 of the Constitution of Kenya, 2010 while at the same time seek to unjustly enrich themselves by seeking to be paid without having reported back to work.
 - (v) THAT further failure, if any, by the Respondent/Applicant to pay the Claimant/Respondent any dues owed is not attributable to the Respondent/Applicant as the Claimant/Respondent has refused, ignored and/or declined to furnish the Respondent/Applicant with information pertinent to her employment status at First Community Bank specifically the date of appointment and the duration of the same to enable the Respondent/Applicant compute any outstanding liabilities, if any, to the Claimant/Respondent.
 - (vi) THAT allegations of slavery and servitude are thus not only unfounded, but also incorrect, hysterical and generally meant to hood wink this Honourable Court to perpetuate an illegality.
 - (vii) THAT on whole consideration of facts, the Respondent/Applicant's Notice of Motion Application dated 21st December, 2020 is

one contesting the issue of service and not the substance of the Claimant/Respondent's allegations with respect to the core issues in the matter.

(viii) THAT further, the said Application only seeks to have the Respondent/Applicant granted an opportunity to respond to the Claimant's contempt Application and which Application the Claimant by design locked out the Respondent from being heard.

(ix) THAT on the whole, on a consideration of the facts and the law, the Claimant/Respondent's Notice of Preliminary Objection dated 21st January, 2021 is misapprehended, mischievous, lacks merit, is a clear abuse of the Court process and ought to be dismissed with costs to the Respondent/Applicant.

3. The motion was argued orally and the Claimant's advocate, Mr. Mwaura, submitted that the Preliminary Objection is based on the fact that the Applicant has always been aware of the Court order and went to the Court of Appeal against the order of court. That the Respondent's application for stay of execution of the said order was dismissed on 5th December 2017 and when it went to the Court of Appeal, the Respondent was granted stay pending appeal on 23rd February 2018. That the appeal was struck out on 6th August 2019 and the Claimant resumed duty on 28th August 2019. He submitted that the Respondent is not entitled to audience of court as it has always been aware of the court order. That everyone has a right to fair labour practices, fair remuneration and fair working conditions but the Claimant has not received any pay for 4 years and has further been denied the right to get another employment. His main submission was that the Respondent has disobeyed a court order and should not be heard.

4. In opposition to the Preliminary Objection, the Respondent's advocate, Mr. Mbogo stated that they rely on the case of **Mukisa Biscuit v West End Distributors Ltd [1969] EA 696** and submitted that the preliminary objection as raised is not in real sense a preliminary objection since it raises issues which require ascertainment of facts and does not raise points of law. They rely on the case of **Janet Syokau Kaswii v Kathonzweni Financial Service Association [2014] eKLR ELRC 774 of 2012** and submitted that a violation of a right as alleged by the Claimant can only be shown by particularisation of facts and that it is therefore prejudicial to deny the Respondent to be heard on the assertion of denial of rights. He stated that as the Respondent only seeks to be heard on the motion seeking to hold it in contempt, compliance can only be shown on factual basis and that they rely on their grounds of opposition of 2nd February 2021.

5. In a brief rejoinder Mr. Mwaura for the Claimant responded that the Respondent's advocate does not state they obeyed the court order of October 2017 and that they do not also state that the Claimant is working for the Applicant as per directions of the order. He objected to the Respondent's objection, stating that the preliminary objection is on clear points of law and prayed that the authority cited by the Respondent be disregarded since they were not served well in advance. He further stated that the ground that the Respondents do not respect court orders would allow Court to decline to hear whether or not they obeyed the court order.

6. In its Notice of Motion Application dated 21st November 2020, the Respondent is seeking to stay all the proceedings in this matter and more specifically the *ex-parte* Order issued by the Honourable Court on 9th December, 2020. It further seeks for the Court to discharge and/or set aside the said orders of 9th December 2020 and to grant the Respondent leave to file and serve its Replying Affidavit to the Claimant's Application dated 30th November 2020. The Claimant has raised a preliminary objection against the Respondent's application on the main ground that since the Respondent has never obeyed the order issued by Court, it has no audience in this Court. In the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** it was held that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In the instant case, the preliminary objection raises grounds on disobedience of court orders and violation of rights under the Constitution. In my opinion, the Claimant's preliminary objection does not raise pure points of law as disobedience of court orders or violation of rights are facts that have to be ascertained by this Court. The preliminary objection is devoid of merit and is dismissed albeit with no order as to costs. Directions to follow this Ruling in respect of the motion by the Respondent.

It is so ordered.

Dated and delivered at Nairobi this 24th day of February 2021

Nzioki wa Makau

JUDGE