



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1431 OF 2018

(Before Hon. Lady Justice Monica Mbaru)

DR. JAMES WAFULA WENYAA.....CLAIMANT/APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MACHAKOS.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF MACHAKOS.....2ND RESPONDENT

RULING

The petitioner filed application dated 26th October 2020 and amended notice of motion brought under sections 16, 20 and 87 of the Employment and Labour Relations Court Act seeking the following orders:

- a) Spent
- b) *The Court determines particulars of the claimant/Applicant's itemized pay statement which ought to have been provided by the Respondents at Kshs 11,773,570.*
- c) *Upon granting prayer 2 above, this court grants orders deeming the Respondents to have given the claimant/Applicant itemized pay statement at Kshs 11,773,570.*
- d) *T Court convicts the Respondents' officers in charge of payroll management with an offence under Section 16 (4) of the Employment Act 2007 finding the said officers jointly and severally liable to a fine not exceeding One Hundred Thousand Shillings or to imprisonment for a term not exceeding two years or to both.*
- e) *That in addition to or in lieu of such conviction, the court be pleased to order punitive and exemplary damages and interest at court rates on the outstanding salary arrears from the date the payments became due until settlement in full.*
- f) *This court be pleased to issue any other orders as it may deem fit and just.*
- g) *That costs of this application be borne by the Respondents.*

The application is based on the grounds on the face of the application and the Supporting Affidavit of DR James Wafula Wenyaa sworn on 26th October 2020.

- a) *On the 13th March 2019, the court issued orders, to the 1st respondent and 2nd Respondent that the ½ salary of the Claimant be reinstated and arrears not paid be paid immediately, that the Respondent if they wish should proceed and conclude any disciplinary process within 6 months prior to the date herein and that in default the Applicant to be considered cleared of any wrongdoing and the cost of the Application be in the cause.*
- b) *The said order was duly served on the Advocates of the Respondents, M/S J Muoki & Company Advocates, on the 28th of March 2019 which was duly acknowledged by the Respondent's Advocates.*

c) *The Claimant/Applicant's Advocates on the 28th of March 2019 further requested the Respondents to provide consonance to the withheld salaries as tabulated by the Claimant Applicant, dully aware of the Orders of this Court by dint of service on their Advocates have willfully failed and/or refused to comply with the orders issued by the court.*

d) *It is the mandate of the respondent and/or officers under them to provide the Claimant with an itemized pay statement under section 20 of the Employment Act, 2007 in compliance with the court order issued on the 13th March 2019.*

e) *In the circumstances, the Respondents and their officers continue to be in willful and blatant contempt of the orders made by this Honourable Court on the 13th Of March 2019 by their willful failure to provide the claimant with an itemized pay statement under section 20.*

f) *The blatant contemptuous acts of the Respondents and their officers have rendered the orders of the Honourable court pointless/unenforceable and put the Honourable Court and its process to public ridicule.*

g) *Section 16 of the Employment Act states that person who fails to give to an employee a statement as required by section 20 commits an offence and shall, on conviction be liable to a fine not exceeding one hundred thousand or to imprisonment for a term not exceeding two years or both.*

h) *The Applicant is apprehensive that unless the Court urgently intervenes as sought, the claimant will have been denied benefits of the court orders and processes: and the authority of the court to do justice gravely eroded by the Respondents' blatant contempt of Court Orders.*

i) *In the Circumstances this contempt of court application is by its own very nature, and with regard to the net effect of the contemptuous acts of the Respondents/Contemnors, an urgent application.*

j) *It is just, equitable and in the interest of justice that this Court acts swiftly and decisively in face of such willful and blatant disregard of its authority and dignity: and to uphold the Court's integrity and sanctity of court processes: and secure that court process and court decisions/orders are not rendered in vain.*

The Respondent opposed this Application and filed the Replying Affidavit of Dr Joel Mwoya, the Respondents' Chief Officer, on 22nd January 2021.

Mwoya avers that the instant Application is premature, overtaken by events and not based on facts. Further that the claimant was reinstated on 23rd July 2020 as ordered by the court and that the Claimant reported to his new station on 27th July 2020.

In respect to payment of the amount due to the claimant, the Respondent maintains that the National Government stopped all payments since June 2020 due to COVID-19 pandemic and that the only money released since then was for salaries for the period July and August.

As for release of an itemized pay statement the respondent explained that as a result of the COVID-19 pandemic, the respondents compelled most of their staff not to come to work and as such they have not been able to prepare an itemized pay statement as per section 20 of the Employment Act, 2007. Further that for an award as huge as the one awarded to the Claimant, the County needs to put it in their next financial year's budget and forward it to the county Treasury for approval after which the National Treasury may approve its payment wholesomely or in installments.

The Respondent further avers that it is only after getting the payment plan from the National and County Treasuries that they can prepare an itemized pay Statement as per section 20 of the Employment Act, 2007.

The Respondents aver that they have not been contemptuous to this court but have been unable to comply with the court orders due to the circumstances arising from the unseen COVID-19 pandemic and the aforementioned financial requirements. They maintain that they have done whatever is possible to try and settle the orders of this Court.

When the matter came up for hearing, the respondents indicated that they would rely on their Replying Affidavit while the Claimant/Applicant confirmed that he would rely on the grounds on the face of the amended Notice of Motion and his Supporting Affidavit.

The Claimant prays for tabulation of his award as ordered on 13th March 2019. That failure to comply with the said orders pushed him to file the instant application for contempt. Further that the National Government has disbursed funds to counties as confirmed in their supplementary bundle of documents and as such, the Respondents must stop misleading the court.

The Respondents maintained that they were not in contempt of court orders but were unable to comply due to pandemic constraints. That they are waiting for funds release from the National Government.

DETERMINATION

The issues which emerge for determination are follows;

a) A determination on the particulars of the itemized pay statement for Kshs 11,773,570.

b) Whether the Respondents' officers in charge of payroll management are guilty of an offence under Section 16 (4) of the Employment Act 2007.

It is not in dispute that on the 13th March 2019, the court issued orders to the respondents that the ½ salary of the Claimant be reinstated and arrears not paid be paid immediately. Though the Claimant's half salary has already been reinstated the unpaid dues owes. It is also not in dispute that the order was served upon the Respondents' advocates who acknowledged receipt of the same. The Claimant's Advocate also sent a letter to the Respondents requesting them to send them an itemized pay statement to enable them tabulate the arrears due to the claimant. To date, the itemized pay statement is yet to be availed by the Respondents.

On their part, the Respondents do not deny that they have neither paid the arrears as directed by the court nor have they sent an itemized pay statement. They attribute the failure to pay the arrears to the delay by the National Government in releasing funds to the counties. They further explain that in a bid to contain the COVID-19 pandemic they compelled most of their staff not to come to work and as such they have not been able to prepare an itemized pay statement as per section 20 of the Employment Act, 2007.

Section 20 of the Employment Act, 2007 provides that:

(1) An employer shall give a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.

(2) The statement specified in subsection (1) shall contain particulars of—

(a) The gross amount of the wages or salary of the employee;

(b) the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and

(c) Where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

It therefore follows that section 20 gives a mandatory responsibility to the employers.

Section 16 of the Employment Act, 2007 provides as follows:

(1) Where an employer does not give an employee a statement as required by section 10, 12 or 13 or an itemized pay statement as required by section 20, the employee may file a complaint with the labour officer and the complaint shall be deemed to be a complaint filed under section 87.

(2) Where as a result of a complaint arising out of section 10, 12, 13 or 20 the Industrial Court determines particulars which ought to have been included or referred to in a statement given under these sections, the employer shall be deemed to have given to the employee a statement in which those particulars were included or referred to as specified in the decision of the Industrial Court.

The practice of an employer failing to issue an employee with an itemized pay statement no matter what excuse is put forward is a matter that is abhorred by fair labour practice. The court is not persuaded by the explanation given by the Respondents; that they compelled most of their staff not to come to work and as such they have not been able to prepare an itemized pay statement as per section 20 of the Employment Act, 2007. That only the staffs who were offering essential services were allowed to come to work. This confirms that the Respondents had the authority to call those who in their opinion were offering critical services. Services that assist the respondents in complying with court orders are critical services.

The Respondents have not advanced a valid reason as to why they did not prepare and avail an itemized pay statement as required under section 20 of the Employment Act, 2007.

There being no itemized statement from the respondent and there being no valid reason as to why this is yet to be availed, the court is bound by the claimant's tabulation.

As outlined above, the issuance of an itemized Pay statement is a mandatory requirement. Section 16 (4) of the Employment and Labour Act, 2007 provides that:

“...A person who fails to give to an employee a statement as required by section 10, 12, 13 or 20 commits an offence and shall, on conviction...”

This brings an element of a criminal conduct and a labour offence(s) and upon a report, investigation by the appropriate agencies; the respondent officers are subject to a conviction. This mandate is placed with the Kenya Police Service and the County Labour Officer covering the region the respondents are placed.

On the finding above, the County Labour Officer, Machakos County shall address the offences as set out above and pursuant to section 16(4) of the Employment Act, 2007 and who shall report back to the court within 30 days.

Accordingly, the Registrar shall extract the Orders herein and serve the County Labour Officer, Machakos to address pursuant to

section 16(4) of the Employment Act, 2007 and report to the court within thirty (30) days.

Costs herein awarded to the claimant.

DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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