



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

ELRC CAUSE NO. 100 OF 2018

TOWETT K. GEOFFREY.....APPLICANT/CLAIMANT

-VERSUS-

THE PRINCIPAL - BOMET UNIVERSITY COLLEGE.....RESPONDENT

BOMET UNIVERSITY COLLEGE COUNCIL A CONSTITUENT COLLEGE

OF MOI UNIVERSITY.....2ND RESPONDENT

RULING

1. This ruling is in respect of the applicant/Claimant’s application dated 20th April, 2021 filed under certificate of urgency pursuant to Order 22 Rule 26, Order 34 Rule 5, Order 51 Rule 1 and 3 of the civil procedure Rules, section 17(4), 19(3) & 23 of the Employment and Labour Relations Court Act and Section 54 of the Employment Act, seeking the following orders;

1. THAT this honorable Court be pleased to certify this Application urgent and fit to be heard ex-parte in the first instance having it on record that the claimant have suffered continuous prejudicial acts of the respondents continually for the last five years on and off and must end forthwith as the consent reached and relief sought bears complete remedies.

2. THAT this honorable court be pleased to grant leave to the Applicant to apply for Orders to wit;

a. That a decree for the relief of payment of a liquidated sum of Kshs. 25,446,880 be attached to the Respondents accounts in their account numbers 016xxxxxxxx, 010xxxxxxxx, 010xxxxxxxx and 011xxxxxxxx and be deducted to the claimant account at Imarisha Sacco Account number 504xxxxxx, Kericho Branch be issued pursuant to Order 22 Rule 26 of the civil procedure rules(INTERPLEADER).

b. Issuance of Certificate of service, in reference to the service dates between 18.02.2010 to 10.03.2021 be ordered to be issue by the respondents to the claimant pursuant to section 51 of the Employment Act and any other relief by court on such terms as may be just.

c. Judgment on disposal on consent to the case pursuant to order 34 Rule 5 of the Civil Procedure Rules, 2010 and the resignation/acceptance terms of letter dated 6.02.2021 and 26.02.2021 respectively be issued.

3. THAT leave so granted does operate as an order (interpleader) for the respondents to release the liquidated sum amounting to Kshs . 25 446,880/- be attached to the Respondents accounts in their account numbers 016xxxxxxxx 010xxxxxxxx,010xxxxxxxx and 112xxxxxxxx and be deducted to the claimant account at Imarisha SACCO Account No 504xxxxxx Kericho Branch and subsequent Issuance of Certificate of service in reference to the service dates between 18.02.2010 to 10.03.2021 be ordered to be issued by the respondents to the claimant pursuant to section 51 of the Employment Act. Thereafter the case can be disposed pursuant to order 34 rule 5 of the Civil Procedure rules 2010 and by resignation/acceptance terms of letters dated 06.02.2021 and 2.02.2021 respectively.

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the Applicant, **Towett K. Geoffrey** on 20th April, 2021 and based on the following grounds: -

a. THAT, he is a former employee of Bomet University and that he resigned from the said employment on 6th February, 2021 and the Respondent accepted all the terms of his resignation by a letter of acceptance dated 26th February, 2021.

b. That, the said consent of terms of resignation was adopted by this Court on 5th March, 2020 and he cleared with the university however the Respondent has refused to pay the agreed sum of Kshs. 25,446,880/- and issue him with a certificate of service for service rendered between 18th February, 2010 and 10th March, 2021.

c. He states that when the consent was adopted by this Court, the employer-employee relationship between the university and him ceased therefore the respondents ought to be compelled by this Court to perform its part of the consent.

d. He urged this Court to allow the application as prayed in the interest of justice.

3. In opposing the application, the Respondent through its' Deputy Principal **Prof. Loice Chemnetich Maru**, swore a replying affidavit on 4th May, 2021 and filed in this Court on 5th May, 2021 on the following grounds;

a. That, the applicant herein filed this suit on 27th September, 2018 seeking interalia to block his redeployment to another department and or termination of his services, which was later consolidated with another case instituted by an employee of the university one Godwill K. Bett who withdrew his case on 5th March, 2020.

b. That the claimant on 4th February, 2020 amended his claim without leave of Court and sought for withheld salaries, damages for breach of employment contract, payment of pension, for the resignation to be lifted and the claimant be deemed to have been constructively dismissed and the claimant be issued with certificate of service.

c. That as the matter was pending for hearing, the claimant was re-deployed to Moi University.

d. That on 5th March, 2020 the matter came up for mention for directions as scheduled however the Claimant apprised Court on the intention to settle the suit amicable including the issue touching on the reliefs he was seeking in the Claim. consequently, the Court adjourned the matter to 12th May, 2020 for further direction.

e. That in the bid to settle the issue between the parties herein, 2nd respondent held a meeting to discuss the said proposal and recommended that the claimant be employed as a staff at Bomet University and an Ad-Hoc committee was formed who invited the claimant to the said meeting to deliberate on the issues at hand.

f. That the said Ad-Hoc committee affirmed the 2nd Respondent decision to have the claimant as a staff at Bomet University but was not to be paid any salary arrears since the redeployment as he had not rendered any service to the university.

g. It is stated that the decision of the Ad-Hoc committee was communicated to the claimant who was agreeable and he was issued with a new letter of appointment 20th February, 2020 as the clerical officer scale BUC 5 therefore the resignation letter of 2nd November, 2019 was overtaken by events.

h. It was therefore stated that, when the claimant was retained as a staff of Bomet University the issues raised in this suit were amicable settled and the entire suit herein ought to be marked as settled.

i. She however contends that there is no consent, signed and filed before this Honourable Court as alleged by the claimant or any other between the parties herein to warrant the issuance of the orders ought in this application.

j. That the claimant in the pendency of this suit resigned again on 6th February, 2021 from the University and his resignation accepted on 22nd February, 2021 therefore the issue of the current resignation does not form the issues in dispute in this case.

k. The Respondent therefore states that since there is no consent entered between the parties the application is incompetent and an abuse of Court process that ought to be dismissed.

4. The application herein was disposed of via written submissions with the Applicant filing on 28th April, 2021 and a summary of the submissions on the 5th May, 2021, while the Respondents filed their on 3rd June, 2021.

Applicant's submissions

5. The applicant submitted that this suit was filed in 2018 after the respondent had frustrated his services and while the issue was in Court the respondent re-deployed him to Moi University where he was rejected and on coming back due to frustration by the Respondents he resigned on 8th November, 2019 and his claim was at Kshs. 24,025,393 which was considered by the Respondent and they resolved to retain him at the respondents' employ without loss of any benefits.

6. He submitted that the respondent failed to pay him his dues as claimed and in turn frustrated him further forcing him to resign a second time by a letter of resignation dated 6th February, 2021 on conditions that he was to be paid his dues of Kshs 25,446,880, being service pay, salaries wrongfully withheld and the incurred expenses occasioned by the respondents and the damages for the action that led to his resignation, which resignation was accepted by the respondents on 22nd February, 2020 and the said terms adopted by the Court on 5th March, 2020.

7. He argues that he performed his part of the resignation terms and cleared with the Respondent however the Respondent have failed to issue him with the certificate of service and pay him his terminal dues agreed upon and adopted by the Court on 5th March, 2020.

8. He therefore urged this Court to compel the respondent to comply with the consent Order of 5th March, 2020 and pay him his dues.

Respondent's submissions.

9. The respondents on the other hand submitted that when this case was mentioned on 5th March, 2020, it is the claimant that intimated the issue of negotiating the claim with a view of setting which Court directed parties to explore that possibility and scheduled the matter for mention on 12th May, 2020 to record a settlement. That the respondent being guided by the Court's directions and the need to settle the said claim resolved to appoint the claimant as a clerical officers under scale BUC 5 which appointment was accepted by the claimant as such the claim was in their view settled and was only awaiting to be recorded in Court.

10. It was submitted that there was no consent on damages or at all that was arrived at and recorded in Court on 5th March, 2020 a envisaged under Rule 19 of this Court Rules and reinforced by citing the case of **Munyiri –v- Ndunguya [1985] eklr.**

11. He argues that if there was any consent as alleged then the claimant need to have attached a copy of the same in his application as envisaged under section 107 of the evidence Act, in that he who alleged must prove.

12. With regards to the certificate of service, it was submitted that the same was issued to an employee after clearing and after payment of dues upon request of the employee which has not been paid to the claimant as such certificate shall be issued in due course.

13. The respondent further submitted that the claimant has misapprehended the law by terming his claim as an interpleader under section 58 of the civil Procedure Act and that the prayers for interpleader have been improperly drawn therefore ought to be disregarded.

14. In conclusion, it was submitted that since there is no consent capable of being enforced, the applicant application herein ought to be dismissed and suit proceed to its logical conclusion.

15. I have examined all the averments and submissions of the parties herein. The applicant seeks to enforce what he terms as contents of a consent order between him and the respondent dated 26/2/2021. There is however no consent filed in court file as alleged and no consent was adopted by this court on 5/3/2020.

16. As per the court record the parties had agreed to record a consent and the court directed a mention on 12/5/2020 so as to record the consent. This was never done when this application was filed.

17. In considering this application, I note the applicant seeks substantial orders which can only be granted after hearing the main claim. It would be a tall order to consider prayers sought in this interlocutory application.

18. I therefore find the application not merited and dismiss it accordingly and direct the applicant to proceed with the main claim.

19. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 29TH DAY OF JUNE, 2021

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mr. Ondieki for 2nd respondent – present

No appearance for other parties

Court Assistant - Wanyoike