



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.....RESPONDENT

RULING

1. The Respondent/ Applicant filed a Notice of Motion Application dated 28th June 2021 seeking for Orders:

1. *Spent*

2. *Spent*

3. THAT this Honourable Court be pleased to review, vary, vacate and/or set aside the Order issued on 9th December 2020.

4. THAT this Honourable Court be pleased to review, vary, vacate and/or set aside the Order issued on 8th November 2017 as it has since been superseded by events.

5. THAT this Honourable Court be pleased to issue such further orders and/or directions as it may deem just and necessary.

6. THAT the costs of this Application be provided for.

2. The Application is based on the grounds that the *ex-parte* order issued by this Honourable Court on 9th December 2020 required Leparan Gideon Ole Morintat, the Applicant's Chief Executive Officer and Accounting Officer, to show cause within Thirty (30) days why contempt of court proceedings should not be commenced against him for not complying with the court orders issued on 8th November 2017. That the notice period set in the said order which started running on 3rd June 2021 is set to lapse on 3rd July 2021 and that the Applicant complied with the Order of 8th November 2017 as the Claimant was reinstated to work and the salary arrears due to her for the months of August 2017 until February 2018 were paid. That however upon reinstatement and resuming duty, the Claimant absconded duty and failed to report to work any further on her own volition and it has since been discovered that she has secured alternative employment. The Applicant asserts that the claim for salary arrears from August 2017 to August 2020 is thus erroneous and misleading and may be construed to be an act to defraud the Applicant herein. The Applicant further asserts that it is necessary to establish the dates from when the Applicant secured alternative employment as proceeding to remit payment for the period stated in the Orders of the Court dated 9th December 2020 would result in double payment of salary arrears. Further, that the order of reinstatement was issued after the Applicant had already recruited a new Head of Human Resource and Administration on 7th November 2018 and that there are sufficient reasons for this Honourable Court to review its Orders so as protect the interests of all parties during pendency of the matter in Court.

3. The Applicant's Manager Carol Musau depones in the Supporting Affidavit that despite the Claimant's reinstatement pursuant to the Court of Appeal Order of 6th August 2019, the Claimant only reported to work on 28th August 2019 and thereafter absconded duty contrary to the terms of her employment contract and the Applicant's HR Policy and that she also rejected the office facility allocated to her. She avers that the Claimant has to date never provided any valid reason for her absentia and which led to the Applicant citing her for disciplinary action and finally dismissing her from its employment. She further avers that since the Claimant obtained alternative employment, she has come to this Court with unclean hands and is misleading the Court by seeking payment for periods during which she has been in gainful employment. Further, that the Claimant's failure to disclose this important fact led to this Honourable Court misdirecting itself in granting an order for payment of salary arrears from August 2017 to August 2020. She further depones that the Applicant has since sought from the CEO of the said First Community Bank vide its letters dated 10th September 2019 and 16th June 2021, information as to the Claimant's employment status with the said financial institution so as to avoid double remissions of the salary arrears. That the Applicant has also vide a

letter dated 16th June 2021 sought for further information and/or confirmation from the CEO of NHIF as to whether the First Community Bank has been making any statutory deductions on account of the Claimant herein, and the period for which the same relates. She avers that the Claimant is further guilty of material non-disclosure for failing to disclose that the Applicant did indeed pay her salary arrears for August 2017 until February 2018. She asserts that any further payment that may be due to the Claimant can only be upon review of the Orders of 8th November 2017 and 9th December 2020 as there is no way of ascertaining that the Claimant will refund the monies advanced should the Applicant successfully defend the substantive suit. She depones that it is necessary for the Court to allow time for the Applicant to retrieve feedback on the date from which the Claimant secured alternative employment with FCB as it undoubtedly has significant implications on the compliance required of the Applicant. That in any event, the Court ought to consider that the orders issued were in the interim and ought to be set aside due to the change of circumstances and that it is in the interest of justice that parties be heard. Further, that this Court should not aid the mischief of the Claimant and ought to direct her to furnish the Court with the requisite documents and more specifically her letter of appointment at the First Community Bank.

4. The Claimant/Respondent filed a Replying Affidavit wherein she depones that the Application is an abuse of the court process as the Applicant is trying to avoid lawful orders of this Court by filing numerous and unnecessary applications. She avers that the appointment of the new Head of HR by the Applicant was an attempt to scuttle her return to work because she was already sitting at her desk when the email on the same was being circulated and had also notified the CEO in an email dated 9th November 2017. That she was locked out of the office on 10th November 2017 by the Applicant's security personnel and when she reported to work on 6th December 2017 pursuant to the Orders of the Court of 8th November 2017, she was constantly harassed, intimidated, humiliated and out rightly deliberately embarrassed by the CEO in the presence of junior staff who reported to her. That she was further denied access to the Applicant's ICT System and required to proceed on leave and that her advocate even wrote to the Applicant's advocates on 18th December 2017 protesting the ill-treatment and withholding of her salary and allowances. She asserts that the allegation that she failed to report to work is therefore a lie and further because the vacancy of Head Resources and Administration was already taken in disregard of the court order.

5. The Claimant/Respondent further avers that the Respondent/Applicant's advocates accused her of failing to report to work for two weeks from the date of Ruling by the Court of Appeal which consequently reinstated her to her position. She depones that the only salary she ever received since her salary for August 2017 was the salary for the period between 5th December 2017 to 31st January 2018 when the application for stay was ruled in her favour pending the purported Appeal. That the averment that she was concurrently employed at First Community Bank is a rumour and avers that the Applicant's CEO instituted disciplinary action against her even before she was reinstated. That she has been amenable to an out of court settlement but has realised the Applicant is taking her round in circles and has further frustrated her attempts to get alternative employment at the First Community Bank by refusing to clear her and instead gave false adverse information against her. She asserts that the Supporting Affidavit is full of falsehoods and amounts of perjury.

6. The Respondent/Applicant filed a Further Affidavit sworn by Carol Musau who avers that feedback received from NHIF indicates that the Claimant has been in employment with First Community Bank from January 2019 to date. She depones that the Claimant is evidently guilty of material non-disclosure and that the Applicant seeks that the Court takes the necessary action on its own discretion to hold the Claimant in contempt.

7. In opposition to the Application, the Claimant/Respondent also filed a Notice of Preliminary Objection dated 9th July 2021 on the ground that the Applicant is in contempt of court and is not entitled to audience the court and that the Application was filed by an unknown agent and alien to the proceedings which renders the entire application incompetent. The Respondent/Applicant opposed the Claimant's Notice of Preliminary Objection by filing Grounds of Opposition dated 19th July 2021 as follows:

1. THAT the Claimant/Respondent's Notice of Preliminary Objection dated 9th July 2021 is misapprehended, lacks merit, speculative and overtly premature and is tantamount to an abuse of the process of this Honourable Court.

2. THAT there is NO judicial decision or pronouncement adjudging the Respondent/ Applicant or any of its officers as contemnors.

3. THAT in any event, the instant Respondent/ Applicant's Application falls within the exceptions posited in the case of Hadkinson vs Hadkinson (1952) All ER.

4. THAT on the whole, on a consideration of the facts and the law, the Claimant/Respondent's Notice of Preliminary Objection dated 9th July 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.

5. THAT on the allegation that the Application dated 28th June 2021 was filed by unknown agent and an alien to the proceedings the same is malicious and incorrect. The firm of Robson Harris & Company Advocates that is on record for the Respondent/ Applicant changed its status to a Limited Liability Partnership and was registered as much on 2nd February 2021 thus the name Robson Harris Advocates, LLP.

6. THAT Claimant/Respondent's Notice of Preliminary Objection dated 9th July 2021 is not proper and does not fall within the ambit of a preliminary objection as established in the locus classicus case of Mukhisa Biscuit Manufacturers Ltd v West End Distributors Ltd [1969] E.A. 696 as it raises issues of fact.

8. The Respondent/Applicant prays that the Claimant/Respondent's Notice of Preliminary Objection dated 9th July 2021 herein be dismissed with costs to the Respondent/Applicant.

9. In regard to the Claimant's preliminary objection, the Respondent/Applicant's advocate submitted that there is no contempt and neither is there judicial decision or finding that the Applicant is in contempt. Further, that the preliminary objection is improper and does not meet the

threshold set in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696** where the Court held that a preliminary objection should consist purely points of law or a point of law which is agreed on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion. He argued that the pronouncement on that case has been reiterated by Courts in many instances such as **HCCC 22 of 1999 Kisumu High Court - Quick Enterprises Limited v Kenya Railways Corporation** where the Court indicated that such preliminary points of law should be capable of disposing the matter preliminarily and should not require the Court to look elsewhere to ascertain anything except the pleadings.

10. The Respondent/Applicant's advocate further submitted that the preliminary objection is not proper as there is no judgment declaring the Applicant to be in contempt and secondly, even in instances where there is contempt of court, there is no general bar of such a party being heard by the Court. He referred the Court to **Hadkinson v Hadkinson [1952] ALL ER 567** where it was held that the Court will only decline to hear a party who impeded the hearing to ascertain the truth and there is no other way of serving the compliance. They submit that their Motion seeks to ascertain the truth of the matter there being fresh evidence sought earlier and had not been availed and that this is a case for judicial discretion. He further submitted that it is not correct that the Application has been brought by an unknown agent and that the Applicant attached to its grounds of opposition a Certificate of Registration of 2nd February 2021 showing the change of the firm's name to Robson Harris Advocates LLP.

11. In regard to the substantive Motion, the Applicant's advocate submitted that the Claimant has admitted in her Replying Affidavit that she was paid salaries for period between 5th December 2017 and 31st January 2018 and thus showing that part of the salaries being claimed were paid. That the Claimant is not contesting the fact that she has been working with First Community Bank and that annexure 2 of the Further Affidavit clearly shows First Community Bank engaged the Applicant on 1st January 2019. That the operation of the Applicant is guided by Public Officers Ethics Act and Regulation 26 clearly prohibits a public officer who is serving in full time basis not to engage in other engagement during their time of engagement. That the request to be paid salaries even at a time she had already gotten alternative employment is not only breach of his duty but also amounts to double payment and that the Court should not permit the Claimant to gain in employment where she was not there. He further submitted that the Court in noting that the Court in noting the concealment of the facts, ought to grant the Motion in terms of prayers 3 and 4 and direct the matter be heard and determined fully.

12. The Claimant/Respondent's advocate submitted that they rely on the Replying Affidavit of the Claimant Mabel Kibore plus the annexures thereto. On the issue of contempt of court, Counsel referred the Court to the letter of appointment replacing the Claimant and submitted that the Respondent/Applicant attempted to defeat the Orders of the Court by pretending they had hired a replacement and which is clear contempt. They argued that they disclosed in the application whose order the Respondent seeks to review that the Applicant had attended numerous interviews for employment. That Counsel for the Applicant has deliberately avoided explaining/submitting why the Claimant is not in receipt of salary for any period and submitted that they had hoped that Carol Musau and Leparan Gideon Ole Morintat who swore affidavits, would come to court and say who they paid the money to.

13. The Claimant has admittedly not been paid some salaries from the narration of facts on both sides. The Respondent in its motion sought to raise as a shield the non-compliance as having been overtaken by events. The Claimant on her part is said to have taken up employment with the First Community Bank, a fact she does not deny. The Respondent's Counsel failed to make an appropriate change of name and if it were to be viewed through the strict lenses the Respondent has no advocate on record as the firm formerly representing it having ceased to exist and the firm now purporting to represent the Respondent not having filed a notice of change. A Limited Liability Partnership (LLP) is a distinct legal entity and being a law firm it cannot just wade into matters without a notice of change of advocates. A mere letter will not do as that may work in the boardroom but not where parties are represented by agents known as law firms.

14. Given the view I have taken on the above and granted the Claimant was less than candid in her approach by not disclosing her new found job, she will receive the pay for the months of August 2017 to February 2018. There shall be no further orders in relation to the payment of salaries. Given the non-disclosure by the Claimant and the partial compliance of the Court order on salaries and reinstatement the Court will not punish Mr. Gideon Leparan Ole Morintat and Ms. Carol Musau the manager who deposed that salaries had been paid for a particular period. There was no proof of payment hence the order for payment of salaries for the period between August 2017 and February 2017. To ensure the matter is concluded before November 2021, the suit shall be listed for directions on 27th September 2021 for directions on the sole remaining issue in the claim. There shall be no orders on the objections or the applications subject of this Ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2021

NZIOKI WA MAKAU

JUDGE