



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 613 OF 2018

DR. JOSPH 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. By the said consent order, the Claimant 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 application dated 17.6.2019 alleging that the Respondent had breached the said consent order by failing to reinstate him to his employment, and prayed for the Vice Chancellor to be punished for contempt of that court order. The court allowed the application but withheld its sentence after the respondent showed that it had partially complied with the order and showed willingness to fully comply with the outstanding part of order.

3. In the meanwhile the respondent brought the instant Notice of Motion dated 29.1.2021 seeking the following orders:

- a. The Honourable Court be pleased to review or vary its judgment delivered on 8.3. 2019 so that the amount awarded reads Kshs.844, 790 instead of Kshs.753, 800.
- b. The Honourable court do give any other or further orders which it deems fair and just.
- c. The costs of the application be provided for.

4. The application is premised on the grounds set out on body of the motion and the Supporting Affidavits sworn on 1.2.2021 by the respondent's Chief Legal Officer Ms Vivian Nyambura and the respondent's Vice Chancellor Professor Victoria Ngumi. The claimant has opposed the application by filing a Replying Affidavit sworn by himself on 9.2.2021.

5. The applicant's case is that as at the time the impugned ruling was delivered, it had fully complied with the consent order by reinstating the claimant and paying to him all his salary and benefits from 1.4.2019 to 17.7.2020; that the claimant failed to disclose that fact on 8.10.2020 when the matter came up for mention and a date was given for the impugned ruling; that in the circumstances, the Vice Chancellor ought not to have been cited for contempt on 22.1.2021; and that the impugned orders are prejudicial because the Vice Chancellor cannot freely discharge her duties after being cited for contempt.

6. For emphasis, the applicant relied on **Kenya Electricity Transmission Company Limited v Kibotu limited [2019] eKLR** where the court discussed the principles for review or setting aside an order or judgment of the court on ground of non-disclosure of material facts.

7. The claimant contends that from 1.4.2019 when the consent order was recorded, the respondent failed to reinstate him until 17.6.2019 when he filed the contempt proceedings, and thereafter, the respondent failed to pay his salary until 5.11.2020 when his salary totaling to Kshs. 1,184,086 was paid directly to his account and no notice of the same was made to him; that the said sum was less by Kshs4000 and a further kshs137,335.20 being pay for 18 days worked in March 2017 and Kshs 274,670 being 36 days accrued leave for 2017; and that in view of the foregoing matters, the applicant is still in contempt of the said consent court order and should be denied audience by this court.

8. For emphasis, the claimant relied on **Benson Wembuye Makana v Tandu Alarm Systems Limited** and **Mohamed Bagajo & Another**

v Registrar of Trade Union where the court declined to review its decision for lack of new and important matter or evidence as contemplated under Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

Analysis and determination

9. The issue for determination is whether the court should review, vary or set aside the orders made on 22.1.2021 which basically cited the applicant's Vice Chancellor for contempt of court.

10. The threshold for granting review is set out by Rule 33(1) of the ELRC Rules, thus:

“33(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which an appeal is allowed, may with reasonable time, apply for a review of the judgment or ruling –

(a) If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) On account of same mistake or error apparent on the face of the record;

(c) It the judgment or ruling requires clarification; or

(d) For any other sufficient reasons.”

11. In this case, the applicant contended that it had complied with the consent order dated 1.4.2021 by reinstating the claimant and paying him his outstanding salary and benefits as at 8.10.2020 but he concealed that fact from the court leading to the impugned orders on 22.1.2021. The claimant has however contended that the applicant refused to reinstate him until June 2017 when he decided to institute contempt proceedings against it. He further contended that the respondent failed to pay all his salary and benefits until 5.11.2020 when it paid part of the said dues to his account without notice to him.

12. Having carefully considered the rival arguments from the two sides, I wish to clarify that the basis for citing the respondent for contempt of court was a finding of fact that it had failed to comply with the consent order passed on 1.4.2019. The order required that the claimant be reinstated to his employment with effect from that date with the consequence that he would start working and being paid his salary.

13. However, the respondent failed to reinstate him or allow him access into the workplace until he instituted contempt proceedings. Accordingly, I found him to be in disobedience of the said court order but treated the late reinstatement and payment as mitigating factor. Consequently, I am not persuaded that disclosure or otherwise of payment of salary and benefits owed to the claimant would have made the court to arrive at a different decision from the impugned orders.

14. In view of the foregoing I find and hold that the applicant has failed to establish any ground for review set out by Rule 33(1) of this court's procedure rules. The applicant has indeed admitted severally in court during the pendency of this application that Kshs.4000 remains outstanding. The claimants claims the said Kshs. 4000 plus Kshs. 137,335.20 being salary for 18 days worked in March 2017. He further claims kshs274, 670 in respect of 36 leave days for 2017.

15. Whereas I am of the view that the employer cannot be compelled to pay cash in lieu of leave to its employee who is still in service, the employer has the legal obligation to pay the employee all his emoluments when they fall due under the contract of employment.

16. In conclusion, the court finds that the application dated 29.1.2021 is without merits and it stands dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 15TH DAY OCTOBER, 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 ruling 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