



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE E565 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

CALVIN ABUYA.....CLAIMANT

VERSUS

PRINCIPAL SECRETARY, MINISTRY OF HEALTH.....RESPONDENT

RULING

1. Before me, for determination is the Claimant's Notice of Motion Application dated 17th September, 2020. It seeks the following orders:
 - (i) ***THAT*** this Application herein be certified as urgent and service of the same be dispensed with in the 1st Instance (***spent***).
 - (ii) ***THAT*** this Honourable Court be pleased to order the Respondent to forthwith release to the Applicant CLEARANCE CERTIFICATE and CERTIFICATE OF LAST PAYMENT.
 - (iii) ***THAT*** the costs of this Application be provided for.
2. This Application is premised on the grounds **THAT**:-
 - (a) *The Plaintiff/Applicant is no longer an employee of the Respondent.*
 - (b) *The Respondent are under duty to release to the Applicant the documents sought herein.*
 - (c) *The Applicant is presently employed by Embu County Government and needs the document to be able to earn*
 - (d) *The Respondent has declined to do so since June 2016.*
 - (e) *The Applicant is a family man and therefore is unable to properly cater for the family.*
 - (f) *It is in the interest of justice to grant the orders.*
3. The Application is supported by the Affidavit of **CALVIN ABUYA**, the Claimant sworn on 17th September, 2020 in which he reiterates the grounds on the face of the motion.
4. The Application is filed under Section 12 of the Labour Institutions Act, 2007 and Section 3, 3A and 63 (e) of the Civil Procedure Act.
5. In response to the Application the Respondent filed a Replying Affidavit deponed by **ALBERT DEQUIRE MOKUA**, the Director, Human Resource Management and Development in the Ministry of Health on 18th January, 2021, in which he avers that the Claimant was first appointed to the Public Service as a Medical Intern with effect from 28th January, 2008 and was posted to Nyanza Province.
6. He further avers that the Claimant did report to the station and was first appointed on probationary terms before his employment was confirmed with effect from 28th January, 2008 vide the letter 27th April, 2010.

7. The Affiant states that the Claimant was promoted to the Position of Medical Officer, Job Group M with effect from 12th June, 2009 vide the letter dated 26th July, 2010.

8. He contends that the Claimant/Applicant was subsequently issued with a Notice to Show Cause letter dated 21st September, 2012 for allegedly absconding lawful duties as from 14th September, 2012.

9. It is the Respondent's contention that this Notice to Show Cause was never responded to by the Claimant/Applicant herein and as a result his salary was stopped with effect from 31st August, 2012 pending the hearing and determination of the disciplinary case in line with the Human Resource Policies.

10. The Affiant further deposes that following the transfer of health functions in the year 2013 the Claimant/Applicant was seconded to the County Government of Kisumu with effect from 1st January, 2014 vide the letter dated 15th May, 2014.

11. Mr. Mokuia in his Affidavit confirmed that the Claimant/Applicant was not issued with the Clearance Certificate and the Certificate of Last Payment as a result of the pending disciplinary matter.

12. He further urged this Court not to consider the Supporting Affidavit by the Claimant/Applicant as it contains misleading averments that are denied in toto.

13. In conclusion he contended that the Application is made in bad faith, is without merit, is an abuse to the Court process and urged this Court to dismiss it with costs to the Respondent.

14. In response to the Affidavit the Claimant/Applicant filed a Further Affidavit deposed to on 28th January, 2021 in which he maintains that he did not receive any Notice to Show Cause as contended by the Respondent.

15. He further maintained that as at 21st September, 2012 he was not working in Kisumu as alleged by the Respondent and was in fact released vide the release letter dated 5th March 2010 and was stationed in Nairobi.

16. The Claimant contends that the last salary he received was in December 2013 and that there is no pending disciplinary action as alluded to by the Respondent herein.

17. He maintained that he was not aware of any salary stoppage as alleged by the Respondent and urged this Court to disregard the Replying Affidavit and allow his Application in terms of the reliefs sought therein.

18. Parties agreed to proceed with the Application by way of written submissions.

Submissions by the Parties

19. The Claimant/Applicant submits that he has the threshold for the grant of the Orders sought in its Application and therefore urged this Court to allow the same as prayed.

20. He further submitted that he did not abscond lawful duties as alleged by the Respondent but rather he was transferred to Nairobi as at 3rd March, 2010 and subsequently to Makueni District Hospital and finally to Kenyatta National Hospital, where he worked until his resignation on 13th June, 2016 due to non-payment of his salary.

21. He further denied any knowledge of the Notice to Show Cause and maintained that there was no reason for the Respondent to withhold his documents.

22. In conclusion the Claimant/Applicant urged this Court, in the interest of Justice, to allow the instant Application as prayed.

23. The Respondent on the other hand submits that the Claimant/Applicant has not met the threshold for the grant of the orders sought in his Application and relied on the case of **Kyangaro v Kenya Commercial Bank Ltd & Another (2004) 1KLR** as cited in **Patrick Waweru Mwangi & Another v Housing Finance Co. of Kenya Ltd (2013) eKLR** in which the Court held that an injunction is an equitable remedy and that he who comes to equity must come with clean hands and must do equity.

24. On the issue of the existence of the Notice to Show Cause, the Respondent submitted that the Claimant/Applicant has failed to prove that its actions were in violation of the law. To buttress this argument the Respondent cited and relied on the provisions of Sections 108 and 109 of the Evidence Act and the case of **Susan Mumbi v Kefala Grebedhin (Nairobi HCCC No. 332 of 1993)**.

25. The Respondent maintained that stoppage of the Claimant's salary was done in line with its Human Resource Policies pending conclusion of the disciplinary process against him.

26. The Respondent argued that its failure to issue the Claimant with the Clearance Certificate and Certificate of last payment was due to the pending disciplinary process.

27. In conclusion the Respondent urged this Court to find that the instant Application fails to disclose any cause of action as against it and

urged the Court to dismiss the same with costs to the Respondent.

Analysis and Determination

28. I have considered the Application, Affidavits, submissions by both parties and the authorities cited. The issue for determination are whether the Applicant has established a prima facie case that would warrant this court to grant the orders sought.

29. In the instant application the Applicant seeks orders compelling the Respondent to release to him his Clearance Certificate and Certificate of Last Payment for purposes of handing over the documents to his new employer for inclusion in its payroll system.

30. The Respondent maintains that it has a valid reason to withhold the documents from the Claimant in line with its Human Resource Policies pending the hearing and determination of the disciplinary hearing against the Claimant for allegedly absconding lawful duties.

31. The type of injunction the Applicant seeks is mandatory in nature.

Under what circumstances can a mandatory injunction be granted?

32. A Court can grant a mandatory injunction when an unlawful act obstructs the proper enjoyment of the Applicant's rights. The Court in those circumstances would compel the Defendant to performance acts that is required.

33. The Court of Appeal in the case of **Nation media Group & 2 others v John Harun Mwau (2014) eKLR** stated:-

a. "It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of special circumstance. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted.

b. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."

34. Similarly, the Court of Appeal in **Lucy Wangui Gachara v Minudi Okemba Lore (2015) eKLR** held:

a. "The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage."

35. I have perused the Statement of Claim filed by the Claimant herein and note that the Claimant seeks the same reliefs therein as he now seeks in this Application.

36. It is my view that allowing the Application would be tantamount to determining the Claim in a summary manner. Further, the Claimant/Applicant has failed to demonstrate exceptional and special circumstances for the grant of the orders he so seeks.

37. It is further my view that the averments and documents filed by the parties appear to be in conflict and would require a full hearing to resolve once and for all.

38. It is only prudent to allow parties to litigate the issues in contention and a decision reached on the merits.

39. In the circumstances I find the Application devoid of merit and direct that parties process the main claim for hearing in the normal manner.

40. Costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2021

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding

objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE