



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.63 OF 2019

BERNARD MWAURA MBUTHIA.....CLAIMANT

VERSUS

NYAHURURU WATER & SANITATION COMPANY LIMITED.....1ST RESPONDENT

AND

COUNTY GOVERNMENT OF LAIKIPIA.....INTERESTED PARTY

RULING

The claimant by Notice of Motion dated 19th November, 2019 is seeking for orders that the status quo subsisting on 6th November, 2019 be maintained as parties had agreed to negotiate separation term and employment contract and the decision of the respondent of 15th November, 2019 terminating employment be stayed and for the court to hold John Muthee the chairman, board of directors of the respondent in contempt of court orders and commit him to civil jail for a period of 6 months for disobeying orders made on 24th October, and 6th November, 2019.

In the alternative the claimant is seeking for orders that there be an order of attachment of the properties of the John Muthee as a consequence of the breach or disobedience of the court orders issued on 24th October and 6th November, 2019.

The application is supported by the claimant's affidavit and a Supplementary Affidavit and on the grounds that by a press release on 15th November, 2019 the respondent terminated the claimant's contract of employment as managing director of the respondent and then caused to be published through the print media on 18th November, 2019 without informing the claimant. These actions go contrary to the orders issued on 6th November and 24th October, 2019 where parties agreed to attempt an out of court settlement and amicably agree on a mutual separation term and record a consent in court on 21st November, 2019.

On 14th November, 2019 the claimant learnt that the respondent was going to convene a meeting of the board in order to discuss the show cause notice of 29th October, 2019 and which the claimant only learnt about in the replying affidavit of the respondent.

The respondent has disregarded the orders of the court and instead of addressing the directions of 6th November, 2019 gone ahead to dismiss the claimant from his employment.

In reply, the respondent filed the Replying Affidavit and Further Affidavit of Peter Kariithi Mwangi the acting managing director and who avers that the alleged press statement issued and published does not emanate from the respondent. the claimant is fond of issuing press statements. When he was served with letter of compulsory leave he issued a press statement instead. The respondent has been undertaking internal investigations with regard to the claimant and during such process it was found the claimant had committed serious mismanagement offences.

The claimant has never provided the respondent with a personal postal address for service and operates on his email account and phone through which the respondent has issued communications to him. the show cause notice was sent through the email address provided.

The claimant did not respond as required.

The respondent issued notice for a special board meeting on 7th November, 2019 and full board meeting on 15th November, 2019 and part of the agenda items was the notice issued to the claimant. There were deliberations and resolution to dismiss the claimant from his employment for grounds set out in letter dated 16th November, 2019. The letter was sent through the email address provided.

Upon receipt of the letter and notice terminating employment the claimant replied by text message seeking to attend and hand over his office.

The claim that the claimant did not receive the notice to show cause is not true.

The orders of 24th October, 2019 do not restrict the respondent from taking disciplinary action against the claimant. Upon the court ruling the parties wished to negotiate and settle the matter by mutual agreement. The respondent board met to consider all administrative matters including the claimant notice to show cause why his employment should not be terminated and he failed to respond and upon deliberations a decision was taken to dismiss him from his employment. Such cause of action was not prohibited.

The interested part filed a Replying Affidavit sworn by Alexander Muchemi, senior legal advisor to the interested party and avers that there is no contravention of the court orders herein as alleged. The consent entered was for parties to enter negotiation without prejudice. The employment relationship has since ceased and court should hesitate to reinstate an employee whose employment is terminated upon the due process.

The parties addressed the application by way of oral submissions.

The claimant has also since filed an Amended Memorandum of Claim.

The issues which emerge at this instance for determination can be summarised as follows;

Whether the court should order and direct the parties to maintain the status quo subsisting as at 6th November, 2019;

Whether there should be stay of termination of employment;

Whether there is contempt of court following orders of 24th October, 2019 and 6th November, 2019.

Going back to the court orders of 24th October, 2019 the court directed that following the claimant's application of equal date that his work benefits be restored and he was to keep off his office save to attend to collect his allocated motor vehicle. Parties were also directed to attend on 6th November, 2019 for hearing directions.

On the due date and 6th November, 2019 parties in good faith agreed to negotiate a settlement and taking into account the submissions by the parties the court directed that;

Mention on 21/11.19 for further directions.

Orders of 24/10/19 are stayed save the claimant shall be paid his due salaries.

Pending the above, the claimant has moved the court with his current application.

Effectively, on 6th November, 2019 the orders issued on 24th October, 2019 stayed to allow for negotiations, there is no contempt thereof by either party as contempt is where a party. Contempt of court is defined in the case of **Republic versus Ahmad Abolfathi Mohammed & another [2018] eKLR** as follows;

Section 4 of the Contempt of Court Act, contempt includes civil contempt, which means wilful disobedience of any Judgment, decree, direction, Order, or other process of a Court, or wilful breach of an undertaking given to a Court. ... it an offence for a person to wilfully and without lawful excuse, to disobey an Order of the Court. This section allows this Court to punish for contempt. It is, therefore, evident that the wilful disobedience of a Judgment, decree or Order properly constitutes contempt of Court.

There must be wilful disobedience of a judgement, decree, direction, order or other process of the court. this includes the wilful breach or an undertaking given to the court.

By the parties agreed to stay the orders of 24th October, 2019 to allow for negotiations, on 6th November, 2019 on the due mention date the court was to either take the negotiated agreement/consent or revert back to the matters standing as at 24th October, 2019. This did not complete as the claimant was dismissed from his employment through summary dismissal and letter dated 15th November, 2019.

Section 15(1) of the Employment and Labour Relations Court Act, 2011 as read with sections 15(3) (4) and Section 77(3) which empowers the court to adopt and implement means of dispute resolution but does not contemplate or empower the court to take over and determine the disagreed issues by itself unless the matter is referred back to the court to address the registered dispute. See **Teachers Service Commission (TSC) versus Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR**.

Section 15 of the Act denotes a separate proceeding alternative to judicial proceedings which is undertaken away from court. where there is agreement achieved, the court is to record the same as the order of the court and where there is no agreement achieved, parties revert back to the position before the negotiations commenced.

As matters stand, there is no negotiated agreement. The claimant has since been dismissed from his employment by summary dismissal on 15th November, 2019. The claimant has filed his Amended Memorandum of Claim.

The court finds no matter of contempt of its orders. To stay the termination of employment or direct parties to revert to the position as at 6th November, 2019 would be to ignore the principles upon which specific performance apply and fail to address the fact that employment of the claimant has ceased. Whether there is unlawfulness or unfairness, such can be addressed on the merit at a full hearing.

Herein is a Memorandum of Claim pending determination.

For the court to address all issues between the parties, hearing directions shall issue.

Accordingly, application dated 16th November, 2019 is declined. Costs in the cause.

Delivered at Nakuru this 6th day of February, 2020.

M. MBAR?

JUDGE

In the presence of: