



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 21 OF 2019

IN THE MATTER OF AN APPLICATION BY RUTH MUTHONI MWANGI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF MANDAMUS

IN THE MATTER OF SECTION 62 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT

IN THE MATTER OF SECTION 89(5) OF THE CRIMINAL PROCEDURE CODE

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO4 OF 2015

IN THE MATTER OF THE KENYA MEAT COMMISSION

REPUBLIC

VERSUS

KENYA MEAT COMMISSION.....RESPONDENT

EX-PARTE

RUTH MUTHONI MWANGI.....APPLICANT

(Before Hon. Justice Byram Ongaya on Friday 6th March, 2020)

JUDGMENT

The applicant filed the notice of motion on 18.10.2019 through Agenes & Mathews Law LLP. The motion was under order 53 rule 3(1) of the Civil Procedure Rules. It is based on the statutory statement dated 14.10.2019 and the verifying affidavit of the applicant sworn on 14.10.2019 and filed on 15.10.2019. The prayers are for:

- a) An order of mandamus directed to the Managing Director of the respondent to compel him to pay the applicant her basic salary arrears from June 2015 to October 2019 being Kshs.879,800.00 and such further basic salary arrears from November 2019 till the date of judgment herein.
- b) An order of mandamus directed to the Managing Director of the respondent to compel him to pay the applicant her remunerative allowance from June 2015 to October 2019 amounting to Kshs.318,000.00 and such further remunerative allowance arrears from November 2019 till the date of the judgment herein.
- c) An order of mandamus directed to the Managing Director of the respondent to compel him to pay the applicant her gratuity from November 2012 to October 2019 amounting to Kshs.864,528.00 and such further gratuity arrears from November 2019 till the date of Judgment herein.
- d) An order of mandamus directed to the Managing Director of the respondent to compel him to pay the applicant her accrued leave allowance from the year 2015 to the year 2019 amounting to Kshs.138, 335 and such further leave allowance from the year 2019 till the date of judgment herein.
- e) An order of mandamus directed to the Managing Director of the respondent to compel him to reinstate the applicant to her employment with Kenya Meat Commission without loss of benefit or position within 15 days of the judgment herein.
- f) In lieu of the foregoing order (e) above on reinstatement, an order of mandamus directed to the Managing Director of the

respondent to compel him to pay the applicant Kshs.5, 190,995.00 or such other amount equivalent to the sum of her basic salary, housing allowance, remunerative allowances and gratuity payment for the seven year remainder of her employment tenure at the Kenya Meat Commission to compulsory retirement age of 60 years.

g) Costs of the application be provided for.

h) Such further or other relief as the Honourable Court may deem just and expedient to grant.

The respondent opposed the application by filing on 05.11.2019 the replying affidavit of Anne Kamau, the respondent's Corporation Secretary and filed through Millimo, Muthomi & Company Advocates.

The Court has considered the material on record and finds that the facts of the case are not in dispute. They are as follows:

a) The applicant was at all material times employed by the respondent effective 01.11.2007 in the position of Accounts Assistant. She initially served on term contracts and later emplaced on permanent and pensionable terms of service.

b) About 28.05.2015 the applicant was charged in CM ACC No.9 of 2015 at the Anti-Corruption Court at Nairobi, Republic – Versus- Ruth Muthoni Mwangi & 5 Others. The case related to alleged fraudulent withdrawal of the respondent's funds from First Community Bank allegedly by the respondent's officers. The charges were under the provisions of the Anti-Corruption and Economic Crimes Act, 2003. Thus by the letter dated 26.06.2015 the applicant was interdicted in view of the criminal charge and while on interdiction she was entitled to half salary and not to leave the duty station without permission. The parties are in agreement that the interdiction was in accordance with section 62 of the Anti-Corruption and Economic Crimes Act, 2003 which provides that a public officer charged with an offence under the Act will be suspended from duty.

c) Prior to full hearing of CM ACC No.9 of 2015 at the Anti-Corruption Court at Nairobi, Republic –Versus- Ruth Muthoni Mwangi & 5 Others, the applicant was discharged on the basis that the charges against her had been recommended by the Ethics and Anti-Corruption Commission (EACC) at a time the EACC had not been properly constituted and the discharge was by the trial court's ruling delivered on 09.04.2018. The applicant was discharged under section 89(5) of the Criminal Procedure Code on account of no valid charges. In making the ruling, the trial court (Hon.L.N.Mugambi, Chief Magistrate) observed that there was no bar for the proceedings to be proceeded with once EACC was properly constituted.

d) After the discharge in the criminal case the applicant wrote to the respondent the letter dated 28.06.2018 to the respondent's Managing Commissioner referring to the ruling of 09.04.2018 discharging her and the meeting on 23.04.2018 at which the applicant's reinstatement back to work was discussed and she was advised to await the EACC's communication. The applicant stated in that letter that 3 months had lapsed and she was still waiting for justice and she requested to be allowed to resume work. The applicant again wrote to the respondent on 25.01.2019 seeking reinstatement.

e) On 24.05.2018 the respondent had written to the EACC about the applicant's request to resume duty after the discharge in the criminal case. The respondent requested for the EACC to provide advice to enable the respondent to reply the applicant. The EACC replied by the letter dated 24.07.2018 that the relevant file was under review by EACC and it would be submitted to the Director of Public Prosecution with recommendations to charge the suspects afresh.

f) As at September 2019 the respondent has continued to implement the terms of the interdiction by paying the half salary as per exhibited payslip for September 2019.

The **1st issue** for determination is whether the Court has jurisdiction to determine the application. The respondent's case is that the Court lacks jurisdiction because the cause of action arose on 01.11.2012 when the applicant says the respondent failed to pay gratuity or on 26.06.2015 when the respondent started withholding the applicant's half salary, remunerative allowances and annual leave allowance. The respondent's case is that the applicant has filed the application after the lapsing of 3 years of limitation of action under section 90 of the Employment Act, 2007. For the applicant it is submitted that injury is a continuing one and under the same section 90 of the Act, the time of limitation is 12 months from the date of cessation of the continuing injury. As was upheld in **Henry Kipchumba Tarus Versus Postal Corporation of Kenya [2019] eKLR** it was stated thus, "**In George Hiram Ndirangu versus Equity Bank Limited [2015] eKLR the court held that the logical meaning of continuing injury or damage would therefore be violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues...**" The Court finds that the claims in issue in the present case are clearly continuing injuries and they have not ceased so that they are active alleged injuries. The application is therefore not time barred.

The **2nd issue** for determination is whether the applicant has established the remedies as prayed for. It is trite law that mandamus would issue if the respondent is the bearer of the obligation to perform the duty and despite the applicant's demand that the duty be performed, the respondent has refused, neglected or declined to perform the duty. What is the respondent's duty in the instant case? In the Court's considered view, after the applicant's discharge in the criminal case, the legitimate action was for the claimant to request or demand that the respondent lifts the interdiction or otherwise determine the pending disciplinary case. The evidence is that the applicant wrote demanding resumption of duty in what she calls reinstatement and logically through the lifting of the interdiction. She has not received reprieve in that regard.

The Court has revisited the prayers in the application. None of the prayers seeks lifting of the interdiction or conclusion of the pending disciplinary case in view of the persisting interdiction. The material before the Court shows that indeed time has run and both the EACC and the respondent have not taken steps for final decisions to determine the persisting interdiction one way or the other. In view of the lapsed time the applicant is entitled to lament that her justice in the matter is getting inordinately delayed. Unfortunately, there is no prayer made by the applicant for the Court to intervene by way of an order of mandamus in that regard.

The Court has considered the prayer for mandamus that the applicant is reinstated. As urged for the respondent, following the interdiction the claimant is still in the service of the respondent. Accordingly the Court finds that reinstatement was a misconceived prayer in the circumstances of the case because reinstatement suggests there had been a dismissal or termination of the contract of service but which is not the case in the instant case.

The Court has considered the prayers for mandamus that the claimant is paid as variously prayed for. As already found, there was no request or demand that the respondent pays the monies in the sums as prayed for or as now quantified in the prayers and, the respondent refused to pay. Further it has not been established that in view of the subsisting interdiction, the duty for the respondent to pay as prayed for has accrued. As submitted for the respondent the Court follows the holding in **Reverend Daniel Muiruri Ndungu –Versus- Attorney General & Another [2013]eKLR, (upholding Municipal Council of Kisumu –Versus- Madowo [1986-1989]EA 373)** that where no decision had been made as to the respondent's entitlement under the contract of employment, an order of mandamus directing the council to pay the claim was inappropriate.

Thus, the Court returns that the amounts subject of the orders of mandamus in the present application have not been shown to be the applicant's entitlement and therefore due as prayed for. The Court finds that the prayers for mandamus directing payment were obviously premature and unjustified. They will fail.

The Court has considered the respondent's failure to notify the applicant about the EACC's advisory and further considered the respondent's long inaction in the matter after the EACC's letter of 24.07.2018 and returns that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the applicant for:

- 1) Dismissal of the application.
- 2) Each party to bear own costs of the application.

Signed, dated and delivered in court at **Nairobi** this **Friday, 6th March, 2020.**

BYRAM ONGAYA

JUDGE