



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1214 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th April, 2020)

PHYLLIS KAJUJU M'IKIUGU.....CLAIMANT

VERSUS

PRINCIPAL SECRETARY,

MINISTRY OF NATIONAL TREASURY & PLANNING.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. Pending before this Honourable Court for determination is the Notice of Motion Application dated 24th September, 2019. The same was filed under Certificate of Urgency and was filed under Rule 17 (3), (4), (5) and (6) of the Employment and Labour Relations Court (Procedure) Rules, Section 12 (3) of the Employment and Labour Relations Court Act, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and all enabling provisions of the law.

2. The Application seeks the following Orders that:-

- 1. This Application is certified urgent and heard ex-parte in the first instance (spent).***
- 2. Pending inter-patres hearing and determination of this Application the Respondents are hereby ordered to release the unlawful withheld salaries from March 2017 to the date hereof to the Applicant.***
- 3. Pending the inter-partes hearing and determination of this Application, the Respondents are hereby ordered to continue paying the Applicant her full salary less statutory deductions.***
- 4. Pending the inter-partes hearing and determination of the main suit the Respondents be and are hereby ordered to continue paying to the Applicant her full salary less statutory deductions.***
- 5. Pending the inter-partes hearing and determination of this Application, the Respondents are restrained from interfering with the Applicant's employment.***
- 6. The min suit be heard and determined with 3 years from the date of institution.***
- 7. This Honourable Court hereby grants leave to the Applicant to amend her Memorandum of Claim.***
- 8. The Costs of this Application be provided for.***

3. This Application is premised on the grounds that:-

- a. The Respondents employed the Applicant on the 22nd day of April, 1992 as a typist.***

- b. *The Applicant rose through the ranks in various ministries and at the time the dispute had risen to a Senior Personal Secretary at the 1st Respondent's office.*
- c. *In September 2015 the Applicant was sent to Arusha by the 1st Respondent for a training sponsored by the Government of Kenya.*
- d. *On her return from the training the Applicant faced hostility from the Respondents' senior officers and in particular from the Human Resource office.*
- e. *In February 2016, the Applicant proceeded to her annual leave, which had accrued to forty five (45) days.*
- f. *While on leave the Applicant was summoned by the Human Resource Director a Ms. Mucheru.*
- g. *The Human Resource Director accused the Applicant of stealing public funds and pointed out that the Applicant had unnecessarily gone for training in Arusha.*
- h. *The Human Resource Director then asked the Applicant to await her redeployment letter that particular day and asked her to report to her new work station and resume her duties immediately upon redeployment.*
- i. *While the Applicant was waiting for the redeployment letter and in a colleague's office over lunch hour, the Human Resource Director stormed the office and using unpalatable words ordered the Applicant to leave and await the redeployment letter from home.*
- j. *The redeployment letter was however not delivered to the applicant despite several inquiries.*
- k. *On the 9th day of May 2016 upon completion of her leave days, the Applicant resumed work but was advised by the senior Human Resource Manager, Ms. Mutwiri that a decision had been reached that she wouldn't continue working in the same section/department.*
- l. *The Senior Human Resource Manager asked her to go back home and await her redeployment before reporting back to work.*
- m. *While at home, the Applicant constantly called the Human Resource Director and the Senior Human Resource Manager who always asked her to wait for communication as they were working on her issue.*
- n. *Upon receiving no communication, the Applicant made countless trips to the Respondents offices and in particular the Human Resource Director and the Senior Human Resource Manager but still received the same response.*
- o. *The situation continued until March 2017 when the Respondents stopped paying the Applicant her salary.*
- p. *On enquiry, she was notified by the payroll Administrator that the 1st Respondent's Human Resource Director had expressly directed/instructed their department to remove her name from the payroll.*
- q. *The Applicant visited the Human Resource Director's office but she was either denied audience with the Director or the Director would tactfully avoided/evaded her necessitating the institution of the current suit.*
- r. *The malicious and unlawful actions of the Respondents have put the Applicant in financial hardships as she has now run to huge debts with the creditors on her case.*
- s. *The Applicant being the sole breadwinner of her family can no longer pay her bills or provide for her family including paying school fees for her children as she has now been reduced to a beggar who entirely depends on her relatives, friends and well wishers to survive and maintain her family.*
- t. *The Applicant's children are now at the verge of being discontinued from their respective schools due to thee ever growing school fees arrears/balance which has become unbearable to the Applicant.*
- u. *The Applicant has cervical myomas and her doctor has recommended surgery to rectify the problem.*
- v. *Despite needing urgent medical attention, the Applicant has however been forced to live with the cervical myomas endangering her health since she cannot afford the operation costs.*
- w. *The Respondents discontinued her contribution to the National Health Insurance Fund and she is not subscribed to any other health insurance scheme due to financial constraints occasioned by the Respondents.*
- x. *Unless Honourable Court intervenes, the Applicant risks sinking deeper in to financial difficulties, which have already caused a psychological toll on her.*

y. *The Applicant is seeking reinstatement hence the main suit ought to be heard within 3 years as per Section 12(3) (vii) of the Employment and Labour Relations Court Act, 2011.*

z. *No prejudice will be occasioned on the Respondent.*

a. *It is in the interest of justice to allow this Application.*

ab. *Such other grounds and reasons as the Court may allow to be raised or argued during the hearing hereof.*

4. The Application is further supported by the Affidavit of **PHYLLIS KAJUJU M'IKIUGU** sworn on 24th September, 2019, in which she reiterates the averments made in the Notice of Motion Application.

5. In response to the Application the Respondents filed a Replying Affidavit deposed by **KENNETH A. ODHIAMBO**, the Deputy Director Human Resource Management Department at the National Treasury on 18th October, 2019, in which he admits the existence of an employer – employee between the Applicant herein and the 1st Respondent.

6. It however denied having unfairly handled the Applicant in the manner alleged in her application and averred that it did inform the Applicant through its letter dated 5th May, 2016 and Ref. 1992008248/13 of her deployment to the Prisons Department with immediate effect.

7. The Respondents further averred that the Claimant/Applicant did not report to her new work station as directed which resulted in directions being issued by the Director Human Resource Management Department to stop her salary with effect from 1st March, 2017 on account of absenting herself from lawful duty.

8. It is contended that the Claimant/Applicant was thereafter issued with a show cause letter dated 6th June 2017 requiring her to explain why she had not reported to her new work station within 21 days.

9. The Respondents further contended that it did not receive a response from the Applicant and as a result her services were terminated with effect from 1st May, 2018 and communicated to the Applicant vide the letter dated 2nd May, 2018.

10. The Respondents aver that the Applicant is guilty of material non-disclosure of facts by failing to disclose to this Honourable Court that she had already been dismissed from employment as communicated in the letter dated 2nd May, 2018.

11. They further averred that the Orders sought in the instant Application can only be granted upon hearing of the main suit and urged the Court to dismiss the same with costs.

12. The Respondents maintained that the instant Application is baseless and an abuse to the Court process and urged this Court to proceed and dismiss the same with costs to the Respondents.

13. In disposing of the instant Application, the parties agreed to file written submissions.

Submissions by the Parties

14. There are no submissions on record filed by the Claimant/Applicant.

Respondent's Submissions

15. It is submitted on behalf of the Respondents that the Orders sought by the Applicant are not justified and therefore is not entitled to the same.

16. The Respondents further submitted that interim Orders are only meant to preserve the subject matter in dispute and should not be final Orders.

17. The Respondents urged this Court to be guided on the case of **East African Portland Cement Company Limited Vs Attorney General & Another (2013) eKLR** where the Court pronounced itself with regards to interim Orders and stated that *they are mostly injunctive in nature, putting on hold an action, maintaining the status quo, until the substantive dispute can be investigated and resolved. The Court in that matter went on to say that interim orders are not suitable if by their grant, they finally determine the substantive issue.*

18. The Respondents urged this Court to be further guided on the case of **Olive Mwihaki Mugenda & Another Vs Okiya Omutata Okoiti & 4 Others (2016) eKLR.**

19. The Respondents further submitted that the remedy for reinstatement cannot be granted at this stage. For emphasis, they relied on the Court findings in the case of **Anthony Omari Ongera Vs Teachers Service Commission (2017) eKLR** where the Court stated that the rationale is that the Order of reinstatement is final in nature and should only issue in exceptional cases which warrant specific performance with finality.

20. The Respondents further maintained that the Claimant having been dismissed from her employment with it, is not entitled to the reliefs sought in the instant Application at this stage.

21. It is further the Respondents contention that the instant application ought to be dismissed to allow the parties proceed to full hearing and have the matter decided on merit.

22. In conclusion, the Respondent urged this Honourable Court to dismiss the instant Application with costs to the Respondent.

23. I have examined evidence on record from both Parties. Given the Respondent's contention that the Claimant had already been dismissed, issuing orders reinstating her to her service will be prejudicial to the Respondents. The only way to resolve the issues herein would be to order that the claim proceed on priority basis, which I now declare. The application is dismissed.

24. Costs in the cause.

Dated and delivered in Chambers via Zoom this 30th day of April, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ondegi for Claimant/Applicant

Akuno holding brief Wangeci for Respondent