



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 78 OF 2018

ANTHONY JOHN MBITHI.....PETITIONER

-VERSUS-

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR

AND CO-ORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

HON, ATTORNEY GENERAL.....3RD RESPONDENT

NAIROBI COUNTY.....4TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 30th July, 2020)

RULING

The petitioner filed a notice of motion on 14.08.2018 through Mitambo & Company Advocates. The notice of motion was under rules 4(11) and 13 of the Constitution of Kenya Protection of Rights and Fundamental Freedoms Practice and Procedure Rules. The pending prayers for determination are as follows:

- a) That a conservatory order do issue against the respondents jointly and severally restraining them from terminating the petitioner’s employment, his salary and all other benefits incidental thereto and that the petitioner be re-instated forthwith with his full salary and the pending arrears and benefits incidental thereto.
- b) That costs of the application be provided for.
- c) That the Honourable Court be pleased to issue any other relief it might deem fair and just in the circumstances of the case.

The application was based on the attached petitioner’s supporting affidavit and upon the following grounds:

- a) The petitioner is an employee of the 1st respondent serving in the 2nd respondent Ministry. The petitioner is designated as Senior Gaming Assistant Job Group H and has been in employment since 1987.
- b) On 27.02.2014 the petitioner was seconded to by the 2nd respondent to Nairobi County Government as a Senior Gaming Assistant with effect from 01.07.2013 under the same terms and conditions of employment. The duties include inspection of gaming tables, collection of data and submission of reports to the Betting and Licencing Board. He works in casinos within the Nairobi City. He has served diligently per his terms and conditions of service.
- c) On 31.01.2018 the claimant was on duty at Four Acres Casino, Rapta Road as per the duty rota of January 2018, he was maliciously, unlawfully, illegally and irregularly and without any lawful or justifiable excuse obstructed from conducting his duties with an intention of abetting irregularities and illegal acts by distracting his attention. The petitioner tried to get the attention and assistance from his superiors in vain and instead they facilitated his being locked out from the gaming room in order to further their irregular activities in his absence.

d) By the letter dated 31.01.2018 he complaint to the 2nd respondent but he received no reply. Subsequently, his superiors maliciously, unlawfully, illegally and irregularly and without any reasonable or justifiable excuse refused to include him in the duty rota and instead made sure that he did not go to the premises and unlawfully re-deployed him to Nyayo House, main office, without assigning him duties or giving him any desk or any place to sit and work from. The petitioner asked for an explanation but none was given. A demand letter was done to his superiors. He received no response and he continued not to be assigned duties. In June 2018 the petitioner discovered that his salary had not been send. The petitioner wrote to the 2nd respondent the letter of 08.06.2018 but received no reply.

e) The petitioner has been greatly humiliated, inconvenienced, embarrassed, demeaned and he fears that the respondent's activities or conduct implies illegal termination of employment against the Constitution of Kenya, Public Service Act, Employment Act and principles of natural justice. He has been denied fair hearing and has not been heard at all. He has received no communication except being removed from duty rota and his salary being stopped. He has not received a warning letter or been transferred or received a notice to show cause.

f) The interest of justice demand that the application be granted.

The respondents appointed the Attorney General to act for them by the notice of appointment of advocates filed on 17.08.2018. The 4th respondent appointed J.O Magolo & Company Advocates to act in the matter effective 28.08.2018.

The respondents did not file a replying affidavit. On 30.08.2018 the Court ordered:

The petitioner being on secondment in the service of the 4th defendant or respondent and there being no dispute that he has not been dismissed, by consent of the parties the petition is hereby marked determined with orders as follows:

- 1) The 4th respondent at liberty to commence disciplinary proceedings not later than 31.08.2018 failing the petitioner is at liberty to continue on duty at full benefits per contract of secondment forthwith.
- 2) Each party to bear own costs of the proceedings.

The consent order was made in presence of counsel for all the parties.

On 28.06.2019 the petitioner changed its advocates to Gekonge Mogaka & Company Advocates. On 28.06.2019 the petitioner filed the notice of motion under section 30 of the contempt of Court Act, sections 3A and 63(e) of the Civil Procedure Act and all other enabling provisions of the law. The petitioner prayed for orders that the Honourable Court be pleased to issue a notice to show cause to the Minister for Finance, Nairobi County to show cause why contempt proceedings cannot be commenced against him for failure to comply with the consent court order given on 30.08.2018; and costs of the application be provided for. It is urged that the 4th respondent received the copy of the order on 04.09.2018 and the 4th respondent's advocates received the order as forwarded by the letter dated 04.09.2018. The petitioner reported on duty as per the order but has not been assigned duties or paid salaries. The 4th respondent has been promising that the same was being processed but it has not been paid and no duties assigned. The 4th respondent verbally promised the petitioner's advocates that the Court order would be complied with. The 4th respondent has been properly served but in early May 2019 the human resource department informed the petitioner that he would be assigned duties only if there was an order compelling them to do so. In the circumstances the petitioner has continued to suffer. The orders sought should therefore be granted.

Despite service of the application and the relevant hearing notice, the application has not been opposed at all. The evidence is that the 4th respondent is aware of the Court order as per the affidavit of service sworn on 15.05.2019 by John Muthama Kitheka, a licensed process server. In absence of any other material on record, the application by the notice of motion dated and filed on 28.06.2019 is allowed with orders:

- 1) The Deputy Registrar to issue a notice to show cause to the Minister for Finance, Nairobi County to show cause why contempt proceedings cannot be commenced against him for failure to comply with the consent court order given on 30.08.2018.
- 2) The notice to show cause to be fixed for hearing on such convenient date as the Deputy Registrar shall deem appropriate but not later than 30.10.2020.
- 3) In lieu of attendance to the notice to show cause, the Minister may file an affidavit confirming compliance with the order and appear by advocate on the hearing date in that regard.
- 4) The 4th respondent to pay the petitioner's costs of the application.

Signed, dated and delivered by the court at **Nairobi** by video link this **Thursday, 30th July, 2020.**

BYRAM ONGAYA

JUDGE