



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 133 OF 2018

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

IN THE MATTER OF ARTICLES 22, 23, 27, AND 38 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 3, 10, 20, 27, 28, 29, 30, 36, 41 AND 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

ESTHER NJERI MAINA.....PETITIONER

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

RULING

1. Pending for determination before me is the Notice of Motion Application dated 13th May, 2020. The same is filed under Certificate of Urgency and is brought under Section 12 of the Employment and Labour Relations Court Act, 2011 and the procedure rules thereto, Rule 17 (2016) and all enabling provisions of the law seeking the following Orders that:-

1. The Honourable Court do find and hold that the Respondent herein have committed Contempt of Court for disobeying and defying orders and decree issued by this Honourable Court on 16th January, 2019 and 15th April, 2020 and further that this Court does exercise its inherent powers to punish the Respondent for knowingly and intentionally disobeying the said Orders and decree.

2. The Respondent be denied audience before this Honourable Court till and unless the Respondent purges the contempt by adhering to the Court Orders issued by this Honourable Court on 16th January, 2019 and dated 18th January, 2019 and the Judgment and decree issued by this Honourable Court on 15th April, 2020.

3. The Honourable Court be pleased to compel the Respondent to process my April 2020 salary and issued me with employment contract with effect from 15th April, 2020 immediately and the duly executed employment contract to be filed in Court before or on 22nd May, 2020.

4. The costs of this Application be provided for.

2. The Application is premised on the grounds THAT:-

a) The Petitioner/Applicant is an employee of the Respondent since August 2009.

b) The Court Order, Judgment and decree were duly extracted and served upon the Respondents and the Respondent Counsel.

c) Despite having been served and having knowledge of the said Court Order, judgment and decree the Respondent has blatantly defied the same and instead denied the Petitioner herein her April 2020 salary and intentionally refused to issue her with employment contract/appointment letter as ordered by the Court.

d) Further the Petitioner emailed the Respondent severally on the issue of the employment contract and the April 2020 salaries but she received no response to date.

e) The Petitioner is pleading with the Honourable Court to come to her rescue and compel the Respondent to pay her April 2020 salary and issue the Petitioner with an employment contract forthwith.

f) The Respondent has intentionally declined to issue the Petitioner an employment contract as ordered by this Honourable Court on 15th April, 2020.

g) The Petitioner/Applicant is the sole bread winner and she relies on her current employment/salary with the Respondent to fend herself and 5 minors and if the Respondent fails to pay her salary her welfare and that of her 5 minors will be greatly affected especially due to economic hardships of Covid-19.

h) The dignity and authority of the Court must be protected at all times.

i) It is in the interest of justice that the prayers herein are granted in order to safeguard the dignity of this Honourable Court and the rule of law.

3. The Application further supported by the Affidavit of **ESTHER NJERI MAINA, the Petitioner herein** sworn on 13th May, 2020, in which she reiterates the averments made in the Notice of Motion Application.

4. In response to the Application, the Respondent filed a Replying Affidavit deposed by **Mr. AARON TANUI**, its Senior Legal Officer on 20th May, 2020, in which he avers that the instant Application is incompetent as the Petitioner seeks to enforce Orders issued on 18th January, 2019, which orders are no longer alive.

5. He further maintained that the Application is ambiguous as this Court is *functus officio* in this matter having delivered its Judgment. The Respondent further maintains that the order issued on 15th April, 2020 that the Petitioner now seeks to overturn was one of stay and that she lacks the basis for the same.

6. Mr. Tanui further avers that the Application does not meet the criteria for grant of the Orders sought therein therefore urging this Court to dismiss the same with costs to the Respondent.

7. The Respondent admitted having been served with the Judgment and decree of this Court on the 11th May, 2020. It however maintained that the instant Application was thereafter filed on 13th May 2020 just 2 days after service.

8. The Respondent further maintained that given the speed in which this instant Application was filed it has not been accorded an opportunity to study the said judgment and decree and enforce compliance or approach this Honourable if need be.

9. The Respondent further avers that its functions have greatly been affected by the Covid-19 pandemic as it has been forced to work with limited staff members due to government directive thereby hampering its communications.

10. The Respondent further averred that it has not deliberately failed to comply with the Court Orders, maintaining that the same are being considered with a view of compliance or appeal which process has been affected by the current state of affairs owing to the Covid-19 pandemic.

11. The Respondent further avers that it has subsequently filed a Notice of Appeal in this matter. It is further the Respondent's contention that this Court in its Judgment made an order that the implementation of the Judgment in question would await Covid-19 which fact is duly acknowledged by the Petitioner in her email of 15th May, 2020. It is on this basis that the Respondent maintains that the instant Application has been filed in bad faith.

12. The Respondent maintains that the Order made on 18th January, 2019 is no longer alive as it was an interlocutory order and that the main Petition has since been determined. Mr. Tanui maintained that the Respondent can therefore not be accused of contempt with respect to this order.

13. The Respondent further maintained that it is currently experiencing financial difficulties occasioned by the Covid-19 pandemic due to its closure and non-payment of school fees by its students occasioning it to run out of funds to pay seasonal contract employees and that salaries for the said employees has since been stopped.

14. It is further the Respondent's contention that the averment that the Petitioner has been singled out and/or victimized is not true.

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

16. In her brief rejoinder to the Respondent's Replying Affidavit, the Petitioner filed a Further Affidavit sworn on 18th June, 2020, in which she confirmed having received her April, 2020 salary on 9/6/2020 following her persistent visits to the Respondent's office that led to the salary being processed. She however maintained that subsequently the Respondent has withheld her May, 2020 salary which is in complete disregard to this Court's Orders.

17. The Petitioner further maintained that the allegation by the Respondent that it was forced to close down following Covid-19 pandemic is not true as the office of the Deputy Vice Chancellor as well as those of all senior Administrative officers remained open and therefore compliance with the Order was possible.

18. The Petitioner avers that she has been working from both home and her office within the Respondent's premises and that her Head of department is aware of the arrangement. She further averred that the allegation that the Respondent is having financial difficulties is not true as no evidence has been availed to this Court to ascertain the allegation.

19. She further maintained that the Orders were personally served on the Respondent and that failure to comply is an act of victimization against her having filed the Petition herein. She further maintained that the Respondent has also failed to issue her with her employment contract as directed by this Honourable Court on 15th April, 2020.

20. She therefore urged this Honourable Court to allow her Application as prayed.

21. Both parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

22. In her submissions, the Petitioner maintained that the Respondent is in contempt of this Court's Orders as it has deliberately and intentionally disobeyed this Court's Orders by failing to pay her salary.

23. She further maintained that the Respondent's failure to pay her salary is discriminatory and a violation of her right as protected in the Constitution of Kenya and the Employment Act, 2007. For emphasis, the Petitioner relied on the provisions of Articles 30, 41 and 47 of the Constitution of Kenya, 2010 and Sections 5 and 18 of the Employment Act, 2007.

24. The Petitioner further urged this Honourable Court to set aside the direction on implementation of its Judgment as it is prejudicial as she has been subjected to extreme financial difficulties and psychological trauma as a result of the Covid-19 pandemic. She further argued that the setting aside of the directions will not prejudice the Respondent and that she will be able to enjoy the fruits of the Judgment entered in her favour.

25. In conclusion the Petitioner submitted that she is entitled to the reliefs sought in her Application and therefore urged this Honourable Court to allow the same as prayed.

Respondent's Submissions

26. The Respondent on the other submitted that the Petitioner's Application lacked basis and that it has failed to meet the threshold for the grant of the orders sought therein given the drastic nature of contempt of Court proceedings. To buttress this argument the Respondent cited and relied on the Court of Appeal decision in the case of **Mutitika Vs Baharini Farm Limited (1985) eKLR** where the Court held that *the standard of proof in Contempt of Court proceedings must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The Court went on to state that given that the issue of liberty of the subject is, or might be involved, the breach of which the contemnor is cited for must be precisely defined.*

27. The Respondent further submitted that the Order that the petitioner alleges has not been complied with issued on 16th January, 2019 has since lapsed and that the same was issued at the interlocutory stage and are therefore not subject to contempt proceedings.

28. The Respondent further submitted that the Petitioner has failed to prove service of the Court Order subject to these contempt proceedings by way of filing an Affidavit of Service. It however acknowledged service of the decree on 11th May, 2020 and the instant Application being filed on 13th May, 2020 insisting that the time was too short for the it to comply fully.

29. The Respondent maintained that it has not breached the Court Order as alleged by the petitioner as her allegation of unpaid April, 2020 salary is untrue as the same was paid albeit delayed. It further submitted that the delay was occasioned by an administrative mistake and as a result, a number of employee salaries was delayed.

30. It further maintained that it is a law abiding institution and has not or will not deliberately disobey Court Orders. It is further submitted that this Court having delivered its final judgment in this matter is *functus officio*.

31. In conclusion the Respondent urged this Honourable Court to find that the Application dated 13th May, 2020 is void of merit and should therefore be dismissed with costs to the Respondent.

32. I have examined the averments and submissions of the Parties herein. The Applicant avers breach of this Court's orders dated 16th January, 2019 and 15th April, 2020.

33. On the dates in question i.e. 16.1.2019, this Court granted orders allowing the application dated 16/12/2018 in terms of prayer 1, 2 and 3. The effect of the order was to allow the Applicant proceed on a paid maternity leave and return to work upon completion of the said leave or return to a reasonable job on terms and conditions not favourable than those which would have applied had she not been on maternity leave.

34. On 15/4/2020, vide this Court's judgement, the Court affirmed the position of the Applicant as permanent and pensionable and also ordered that she be issued with a contract of employment detailing that position.
35. The Respondent sought stay orders, which I allowed in the interim due to current Covid-19 Pandemic.
36. The Applicant contends breach of the orders of the Court and failure to pay her her salary for April 2020. She however admitted in the proceedings that she had since been paid her April 2020 salary but not May and June 2020 salary.
37. Her application that the Respondents are in contempt of Court by not paying her April 2020 salary has thus been overtaken by events.
38. As concerns issuance of a letter of contract, I issued orders of stay until this pandemic is over. The Respondents are therefore not in contempt of this Court's orders.
39. The Respondents are however obliged to keep paying the Applicant's salary as when it falls due.
40. I therefore find the application before Court not merited and I dismiss it accordingly. There will be no order of costs.

Dated and delivered in Chambers via Zoom on this **30th day of July, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Thuo for Respondent – Present

Esther the Petitioner – Present