



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 225 OF 2019

SIMON MUNGATHIA ITAHL.....CLAIMANT

VERSUS

KENYATTA NATIONAL HOSPITAL.....1ST RESPONDENT

ENG. NICHOLAS GUMBO.....2ND RESPONDENT

MS. PERIS BUTUTU.....3RD RESPONDENT

DR. RICHARD THUO.....4TH RESPONDENT

DR. NELSON CHEGE KURIA.....5TH RESPONDENT

DR. STANLEY KAMA MAINA.....6TH RESPONDENT

PROF. MICHAEL KIBET KIPTOO.....7TH RESPONDENT

PROF. JAMES MACHOKI M'IMUNYA.....8TH RESPONDENT

DR. E. KIMURI.....9TH RESPONDENT

MR. CALVIN NYACHOTI.....10TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th October, 2020)

RULING

The claimant filed an application notice on 19.03.2020 through Kamau Kuria & Company Advocates. The application was under section 5 of the Judicature Act Cap 8 Laws of Kenya, Cap 49 laws of England and Rules 81.8 and 81.10 of part 81 of the Civil Procedure (Amendment No.2) Rules 2012 of England and Whales. The substantive prayers are as follows:

- 1) That the Honourable Court be pleased to declare and hold that having been served or having been aware of the order of injunction made by the Honourable Court on 08.04.2019 directing that the claimant is entitled to payment of half basic salary, full house allowance and full medical allowance throughout the suspension period and payable on monthly basis, the respondent has in disobedience of that order failed to pay the applicant the monthly payments due to him from the time of the order was made.
- 2) That the Honourable Court be pleased to declare that the respondent's failure to pay half basic salary, full house allowance and full medical allowance throughout the applicant's suspension period on monthly basis, in disobedience of said Court order made on 08.04.2019 amounts to contempt of Court.
- 3) That the said members of the Board of the respondent i.e Eng. Nicholas Gumbo, Ms. Peris Bitutu, Dr. Richard Thuo, Dr. Nelson Chege Kuria, Dr. Stanley Kamau Maina, Prof. Michael Kibet Kiptoo, Prof. James Machoki M'Imunya, Dr. E. Kamuri and Mr. Calvin Nyachoti be committed to civil jail for a period of 6 months each or any other period, or any other or further sanction, as the Court may deem fit and appropriate.
- 4) That costs of the application be provided for.

The application is based on the attached verifying affidavit by the applicant and upon the following grounds:

- a) The court ordered on 08.04.2019 that the claimant is entitled to payment of half basic salary, full house allowance and full medical allowance throughout the suspension period and payable on monthly basis. The respondents have failed to comply with that court order and they have not paid the applicant as was ordered.
- b) The application notice as filed under the invoked law is sufficient for the applicant to obtain the committal orders as prayed for.
- c) The applicant was dismissed by the 1st respondent and he appealed. By an order given on 03.07.2019 the respondents were given time to determine the appeal. The court gave 60 days for appeal to be determined and case was for mention on 14.10.2019 for update on the appeal. The appeal has not been concluded and the applicant remains without any income. He has suffered financial constraints and it amounts to servitude.

The respondent opposed the application by filing the replying affidavit of Calvin Nyachoti, the Corporation Secretary, sworn on 20.07.2020. The grounds of opposition are as follows:

- a) The respondent and its Board members have not been in contempt of orders given on 08.04.2019.
- b) The claimant was dismissed from the respondent's service effective 13.06.2019 and the suspension was lifted without loss of the withheld half pay. The decision was conveyed to the claimant by the letter dated 13.06.2019. Upon dismissal the suspension was lifted without the loss of half salary which had been withheld during the period of suspension.
- c) The half salary was prepared in readiness for payment to him subject to submission of a duly completed and signed Hospital Clearance Certificate which was also forwarded to the claimant by the dismissal letter of 13.06.2020. The claimant has not cleared with the hospital as required to facilitate the release of the said half salary.
- d) The claimant filed an appeal against the dismissal and the Hospital determined the appeal. Having been terminated effective 13.06.2019 the claimant is not entitled to any salary or any allowances with effect from 13.06.2019.
- e) The respondent's advocates by the letter dated 28.02.2020 informed the claimant's advocates that the withheld half salary was available for payment subject to the claimant's submission of a duly completed and signed hospital clearance certificate and that the claimant had so far not cleared with the Hospital.
- f) The current proceedings amount to abuse of court process as they have not met the threshold for contempt of Court. The claimant has not demonstrated how the authority of the Court has been undermined.

Parties filed their respective submissions. The Court has considered the material on record for and against the application. The Court makes findings as follows:

- 1) On 10.04.2019 the Court ordered inter alia, "**2. The claimant is entitled to payment of half basic salary, full house allowance and full medical allowance throughout the suspension period and payable on monthly basis.**" As urged for the applicant and it is not contested between the parties that the orders subject of the contempt application is as given on 10.04.2019 and not 08.04.2019 and the application will be construed accordingly.
- 2) The respondents do not dispute that the order was made and that they are aware of the order.
- 3) The claimant was suspended by the letter dated 13.11.2018. The suspension was effective 13.11.2018. The respondents' case and which is not denied by the claimant is that the suspension was lifted effective 13.06.2019 when the claimant was dismissed. The Court therefore returns that the order in issue as given on 10.04.2019 applies for the period 13.11.2018 to 13.06.2019.
- 4) As submitted for the respondents, after dismissal and lifting of suspension on 13.06.2019, the claimant would not be entitled to the payment as ordered. The Court considers that the order applies until the end of the suspension period.
- 5) At paragraph 19 of the supporting affidavit, the claimant states thus, "**That in disobedience of the said order referred to above, the respondent, has since 1st June 2019, failed to pay me as was directed by this Honorable court or in any event pay any amount of money from the time the said order was made.**" The claimant has exhibited his pay slip for February 2019 which shows that he was paid basic salary Kshs.71, 316.50; Rental House Allowance Kshs.45, 000.00; and Medical Allowance Kshs.1, 740.00. By that evidence the Court returns that the respondent has complied with the Court order as was made. The payment was to be on monthly basis and it was paid until end of May 2019. On 13.06.2019 the claimant was dismissed and the suspension lifted at a time the payment for June 2019 had not become due, the due time being upon end of June 2019. The respondent appears to have invoked the contractual term that in view of the lifting of suspension and the dismissal, the claimant was to comply with the clearance process and then get paid. The claimant has not disputed the invocation of the clearance procedure and the Court considers that he should forthwith clear with the respondent and get paid as per the letter of dismissal and lifting of the suspension. The Court further considers that by clearing and accepting the final dues the claimant's case herein will not be prejudiced in any manner because under the Employment Act, 2007 the claimant is entitled to complain that the dismissal was unfair as per section 47 of the Act.
- 6) The Court finds that after the dismissal on 13.06.2019, the claimant appealed against the dismissal but there is nothing before the Court to suggest that the appeal by the claimant dated 03.07.2019 operated as a stay of the dismissal and lifting of suspension on

13.06.2019. Thus, the fact that the claimant appealed does not mean that the appeal entitled the claimant to continue enjoying the terms of the order of 10.04.2019 in issue as the suspension was effectively lifted on 13.06.2019. Thus between 13.06.2019 and the letter of 21.05.2020 conveying that the claimant's appeal had been heard and dismissed, the Court considers that the claimant has not established the basis for application of the order of 10.04.2019 over that period. The Court upholds the respondents' submission that the order of 10.04.2019 was complied with without fail and the order could not apply after the letter of termination dated 13.06.2019 by which the suspension period also ended.

7) As the main suit is still pending and in view of the history and circumstances of the case, the costs of the application shall be in the cause.

In conclusion, the claimant's notice application dated and filed on 13.03.2020 is hereby dismissed with costs in the cause.

Signed, dated and delivered by the court at Nairobi by video-link this Friday 16th October, 2020.

BYRAM ONGAYA

JUDGE