



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1726 OF 2017

STEPHEN MBUGUA CHEGE.....CLAIMANT/RESPONDENT

- VERSUS -

NAIROBI CITY WATER & SEWAGE COMPANY.....APPLICANT

(Before Hon. Justice Byram Ongaya on Friday 15th March, 2019)

RULING

The applicant filed a notice of motion on 27.06.2018 through Ochieng, Onyango, Kibet & Ohaga Advocates. The application was under rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and any other enabling provision of the law. The applicant prayed for orders:

- 1) The Honourable Court be pleased to review its ruling and orders entered on 13.11.2017.
- 2) The Honourable Court do vary its order issued on 13.11.2017 by Hon. Justice Monica Mbaru and substitute the same with an order dismissing the application dated 30.08.2017.
- 3) That the Honourable Court be pleased to order that the claimant having failed to report to work as directed to do so by the respondent has no claim whatsoever against the applicant.
- 4) The costs of the application be awarded to the applicant.

The application was supported with the affidavit of Maureen Thuo attached thereto and upon the following grounds:

- 1) The order given on 13.11.2017 by Mbaru J was thus, **“(b) That the claimant shall resume his duties with the respondent as Director – Commercial Services on 13th November, 2017 at 2.00pm (1400 hours) for allocation of office and duties by his line supervisor and the Managing Director of the Respondent; (b) That such reinstatement is with all back salaries, benefits and allowances....”** In alternative it was ordered **“(a) That the respondent shall pay for the full contract ending 11th September, 2017 and for the full contract term commencing 11th September, 2017 pursuant to Clause 4.3.2 of the Human Resource Policy and Procedural Manual; (b) That such payments shall be within 30 days from the date hereof;....”**
- 2) The claimant was reinstated as ordered and paid all back salaries, benefits and allowances. The dues for back payment were computed by the applicant’s internal memo dated 11.10.2017. By the letter dated 17.11.2017 the applicant informed the claimant that in line with the court orders, the applicant thereby reinstated the claimant to employment with all back salaries, benefits and allowances and, the claimant was therefore required to report back and resume his duties immediately.
- 3) The claimant failed to report on duty as notified to do.
- 4) The applicant has discovered that prior to the ruling of 13.11.2017 the claimant had, as per gazette notice of 08.11.2017, been appointed the County Executive Committee Member for Transport, Energy and Public Works in The County of Nyandarua and the claimant took up that employment. The appointment was notified in the gazette to have been made by the Governor on 06.11.2017.
- 5) The claimant suppressed the information about his appointment and which was in his knowledge as at the time he filed the application subject of the ruling in issue. If the Court was informed that the claimant had obtained the employment at the county government, the orders in the ruling would have been declined or not made.
- 6) Thus the application should be allowed.

The claimant opposed the application by filing his replying affidavit on 13.07.2018 through M/S Guserwa & Company Advocates. The grounds of objection are as follows:

- 1) On 22.11.2017 the claimant's counsel wrote to the applicant's counsel about the orders by Mbaru J given on 13.11.2017 and the applicant failed to respond. The letter clarified that the claimant had been reinstated for the full contractual term of 5 years. The letter acknowledged that the claimant had received the applicant's letter of 17.11.2017 reinstating the claimant per the orders of 13.11.2017. The applicant's letter of 17.11.2017 had not mentioned terms of reinstatement with full back payment despite the clarification as sought.
- 2) On 24.11.2017 the claimant visited the applicant's office to take up duties but he was not assigned duties and he was not allowed into his office.
- 3) On 05.03.2018 the applicant's counsel visited the office for counsel for the claimant with the sole purpose of compromising the suit and discussed terms of settlement set out in the letter by the claimant's counsel of 8.03.2018 computing the amount of money payable under various headings. The letter requested the applicant's counsel to confirm the terms of the settlement. Counsel for the applicant failed to reply.
- 4) The applicant filed an application for stay of execution at the Court of Appeal and the claimant replied but the same was pending before that Court.
- 5) As a professional the claimant mitigated his losses by taking up the employment with the County Government of Nyandarua and which was in public domain as per the gazette notice and exhibits on the applicant's supporting affidavit herein.
- 6) As at the time of the ruling on 13.11.2017 the claimant had not been employed by the County Government of Nyandarua. Since November 2017, the applicant had been aware of the claimant's employment at the County. The application is calculated to defeat the commitments made between the parties' advocates to settle the matter.

The applicant filed on 27.07.2011 the supplementary affidavit of Monica Tuli, the applicant's acting director for human resources and administration. It was denied that the claimant's allegation that he was not assigned duties and that he was not allowed in his office when he visited the offices on 24.11.2017 was untrue. The affidavit stated that the position was that the claimant failed to report on duty as was ordered prompting the applicant to issue the letter of 17.11.2017. The affidavit further stated that the applicant had complied with the order to reinstate the claimant. On 08.11.2017 the appointment of the claimant at the county was published so that he must have failed to report at work because he had secured alternative employment. Thus he was not willing to report at work on 24.11.2017.

The parties filed their respective submissions on the application. The Court has considered the parties' respective cases and the submissions and makes findings as follows:

- 1) The application for review is filed under rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. An application for review is brought with respect to an order or decree for which an appeal would fall but no appeal has been so preferred. In the instant case, it is not in dispute that the applicant preferred an appeal against the order by Mbaru J given on 13.11.2017. The notice of appeal (as exhibited on the replying affidavit) was dated 13.11.2017 and filed in Court on 15.11.2017 long before filing of the application for review on 27.06.2018. Accordingly, the Court returns that the application for review must fail as it was filed in circumstances whereby an appeal had been preferred against the ruling and the order sought to be reviewed.
- 2) As submitted for the claimant, an appeal would be allowed upon establishment of the prescribed grounds for review per rule 33 (1) being discovery of new and important matters or evidence that was not within the parties knowledge at the time of prosecuting the matter; existence of some genuine mistake or error apparent on the face of the record; if the judgment or ruling requires clarification; or for any other sufficient reason. It is clear that as the hearing of the application leading to the ruling of 13.11.2017 was underway, the recruitment of the claimant by the county government may have been underway. It is not the applicant's case that such recruitment process was such important matter that would have impacted on the outcome of the application or ruling. Further the Court returns that the ensuing appointment as approved by the county assembly on 06.11.2017 was not a matter the claimant can be guilty of not disclosing to the Court at the hearing of the application leading to the ruling of 13.11.2017 because it was on 25.09.2017 that the Court directed that the application be determined by way of written submissions. Thus the Court returns that the claimant was not guilty of material non-disclosure as at the time of hearing the application. In any event the fact of employment at the county government did not constitute such new and important material that existed on 25.09.2017 and which with due diligence could not have been provided to the Court prior to determining the matter; the alleged new material simply did not exist as at hearing as directed on 25.09.2017. The Court further returns that the applicant did not establish any of the other grounds for review as prescribed in the rules.
- 3) The applicant has urged the application as though it was an application for satisfaction of the orders given on 13.11.2017. It is clear to the Court that the present application was substantially an application for review and not an application about satisfaction of the decree and clearly, it was not an application for execution or settlement of matters about satisfaction of the decree. The Court will therefore refrain from delving into the parties' rights and obligations or liabilities in view of the ruling and orders given on 13.11.2017.
- 4) The claimant says that the employment at the county government was a mitigating factor. The fact of that employment was not before the court in arriving at the ruling of 13.11.2017. The Court finds that the employment would therefore not be validly relied upon to redefine the parties' rights and obligations in view of the orders in the ruling.
- 5) The Court returns that whereas section 16 of the Employment and Labour Relations Court Act allows the Court to review its judgments, rulings, awards, orders or decrees, the same must be as per criteria in rule 33 and the Court returns that in the instant

case, the criteria have not been satisfied. The Court considers that the employment at the county government does not constitute a sufficient reason to grant review as applied for because it does not seek to impeach the ruling of 13.11.2017 in any material respect as at the time it was made. The question is: Would such a matter be validly urged before the Court of Appeal to challenge the ruling as made? The Court's answer is not in the affirmative. It cannot therefore be validly urged to justify a review. The Court considers that it might constitute a new cause of action or an explanation for satisfaction of the ruling and the orders thereof one way or the other but will not apply to vary the ruling as rendered on 13.11.2017.

In conclusion the application filed on 27.06.2018 is hereby dismissed with costs.

Signed, dated and delivered in court at Nairobi this Friday 15th March, 2019.

BYRAM ONGAYA

JUDGE