

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 435 OF 2017

LOYFORD MATI.....CLAIMANT/RESPONDENT

VERSUS

1. COUNTY GOVERNMENT OF THARAKA NITHI

2.THARAKA NITHI COUNTY PUBLIC SERVICE BOARD.....RESPONDENTS/APPLICANTS

RULING

1. The application before me is the Respondents/Applicants' notice of motion dated 14th January 2019 expressed to be brought under Section 12 of the Industrial Court Act and Rules 16 and 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. Through the motion, the Respondents/Applicants' seek a review and variation of the orders made on 9th November 2017 and that the Claimant be ordered to refund the sum of Kshs. 587,400/-. The grounds for the motion are set out in the application and mainly are that the court ordered the payment of the Claimant/Respondent's salary pending the *inter partes* hearing of the application dated 7th November 2017, the said application was dismissed on 28th February 2018 and that the disciplinary proceedings commenced against the Claimant were completed on 14th June 2018 finding the Claimant guilty as charged resulting in the loss of employment and his terminal benefits. The Respondents relied on the case of **Grace Gacheri Muriithi v Kenya Literature Bureau [2012] eKLR** which held that an employee who is found guilty at the conclusion of disciplinary proceedings is not entitled to receive salaries from the time he was suspended/interdicted/sent on compulsory leave. It was asserted that under the law of restitution, a party who pays some money under a mistake of fact or law is entitled to recover it and that because the Claimant/Respondent received salaries which he was not entitled to he should be ordered to refund the sums paid by mistake of law.

2. The Claimant/Respondent asserts that the application is a non-starter, misplaced and amount to abuse of the court process. The Claimant/Respondent argues that the orders of the court in respect of the payment of salaries have not been set aside and neither does the motion by the Respondents/Applicants' disclose that the orders on the payment of salaries were made in error or under any mistake of law. The Claimant/Respondent avers that the Respondents/Applicants' have come to court with dirty hands as they have failed to adduce evidence that the salaries were paid. He asserts that he was compelled to move in a contempt application seeking orders against the Respondents for failing to comply with court orders. He argues that if he is forced to refund the sums claimed in the motion the Respondent would benefit by receiving money he was not paid.

3. The application was argued by Mr. Munyori counsel on record for the Respondents/Applicants while Mr. Warutere counsel on record for the Claimant/Respondent opposed the motion. Mr. Munyori argued that the Claimant/Respondent successfully moved the court seeking payment of his salary which was subject of the attempt at recovery. Mr. Warutere on his part argues that the Respondents/Applicants' motion was frivolous, vexatious and an abuse of the court process. He asserts that there was no evidence that the Claimant received the payment being sought in the motion. He submitted that he who alleges must prove and that there was nothing to show the sums were paid. In a brief reply Mr. Munyori for the Respondents submitted that there was no sufficient basis laid for the departure from the case of **Grace Gacheri Muriithi v Kenya Literature Bureau (supra)**.

4. The Respondents' motion seeking the recovery of the sums sought must fail. Under the law of restitution, there is no doubt a principle that unlawful benefits are recoverable. However, the recovery must be upon there being established beyond a preponderance of evidence that a person received a benefit they were not entitled to. In the case before me there is no proof of the benefit being sought and the mere fact that the court ordered the payment of salaries is insufficient to find the Claimant liable. As was pointed out by his counsel, the fact of payment was contested and that a contempt application for disobedience of the order of the court in regard to the payment was even before the court. In the motion, there is an affidavit attached by Dr. Fredrick Njeru Kamunde the County Secretary of the 1st Respondent. He did not avail any evidence of the payment of the sums being sought by the Respondent. In the premises the motion before me is devoid of merit and is dismissed with costs to the Claimant/Respondent.

It is so ordered.

Dated and delivered at Nyeri this 8th day of April 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar