



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 60 OF 2019**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ARTICLES 10, 22, 23, 28, 41, 48, 50, 73, 75, 159 AND 232 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 22, 23, 28, 41, 47, 48, 50, 73, 75, 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015**

**AND**

**IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT, 2017**

**AND**

**IN THE MATTER OF THE PUBLIC OFFICER ETHICS ACT CAP 183**

**AND**

**IN THE MATTER OF THE HUMAN RESOURCE POLICIES AND PROCEDURES MANUAL FOR THE PUBLIC SERVICE, 2016**

**BETWEEN**

**PATRICK OTWANI ATARO.....PETITIONER**

**VERSUS**

**CABINET SECRETARY, MINISTRY**

**OF WATER AND SANITATION.....1<sup>st</sup> RESPONDENT**

**NATIONAL WATER HARVESTING**

**AND STORAGE AUTHORITY.....2<sup>nd</sup> RESPONDENT**

**RULING**

1. On 22 March 2019, the Court issued orders

1. **THAT** pending the inter partes hearing of this application, the Petitioner's salary and other employment benefits be and are hereby reinstated.

2. ...

2. The Respondents, who had been represented in Court on 21 March 2019 when the Court had directed that the parties appear in Court on 22 March 2019 for directions were conspicuously absent. No explanation whatsoever was (has been) tendered for the absence.

3. The Respondents did not comply with the order of 22 March 2019 to pay the Petitioner salaries and benefits, and on 15 April 2019, the Petitioner (hereinafter the applicant) filed a motion seeking orders that

1. ...

2. The acting Chief Executive Officer National Water Harvesting & Storage Authority Engineer Sammy M. Mburu and the acting General Manager of Finance Margaret Kithunzi be detained in prison for a term not exceeding 6 months or such period as the Court shall deem fit.

3. An order of sequestration, attachment and sale of personal properties be issued against the acting Chief Executive Officer National Water Harvesting & Storage Authority Engineer Sammy M. Mburu and the General Manager Finance Margaret Kithunzi.

4. The properties of the acting Chief Executive Officer National Water Harvesting & Storage Authority Engineer Sammy M. Mburu and the acting General Manager of Finance Margaret Kithunzi be attached for a period not exceeding 1 year or for such period as this Honourable Court shall deem necessary for being in disobedience of the orders of this Honourable Court.

5. A declaration that the acting Chief Executive Officer National Water Harvesting & Storage Authority Engineer Sammy M. Mburu and the acting General Manager of Finance Margaret Kithunzi are guilty of contempt of court for failing, neglecting and wilfully declining to reinstate the salary and employment benefits of the Petitioner, Patrick Otwani Ataro.

6. Any other or further relief as this Honourable Court may deem fit and appropriate to grant.

4. Both the 2<sup>nd</sup> Respondent's acting Chief Executive Officer Engineer Sammy M. Mburu and acting General Manager Margaret Kithunzi filed replying affidavits in opposition to the application on 9 May 2019. The applicant filed a further affidavit on 12 June 2019.

5. On 13 May 2019, representatives of all the parties appeared before the Deputy Registrar when the application was fixed for hearing on 25 June 2019.

6. The Respondents did not attend Court for the hearing of the application on 25 June 2019. Again there was no explanation for the non-attendance.

7. The Court has considered all the material placed at its disposal.

## **Background**

8. The legal threshold a party asserting contempt should meet is well known and needs no rehashing in this ruling.

9. The applicant was part of *public officers* involved in procurement and finance functions who were sent on 30 days compulsory leave around 5 June 2018. The *compulsory leave* was to facilitate vetting.

10. The Presidential directive/proclamation on vetting which sent the heads of finances and accounting units was challenged before this Court differently constituted.

11. The Proclamation provided that the affected *public officers* would continue to draw their salaries and allowances during the *compulsory leave*.

12. The applicant upon receipt of a letter sending him on compulsory leave attempted to resist being sent on compulsory leave through a letter dated 5 June 2018, on the ground that he was an *Accounting Officer/Managing Director*, and not head of finance or procurement (applicant's substantive post was General Manager Finance but he was acting as Managing Director at the material time).

13. Upon receipt of the applicant's letter questioning being sent on *compulsory leave*, the Principal Secretary, Ministry of Water & Sanitation informed the applicant on 13 June 2018 of his suspension for violating the directive to go on *compulsory leave*. The applicant handed over the office of Managing Director on 29 June 2018.

14. On 6 July 2018, the applicant wrote to the 1<sup>st</sup> Respondent seeking to have his suspension reconsidered.

15. Around February 2019, the 1<sup>st</sup> Respondent caused the applicant's salary to be stopped hence the order which issued on 22 March 2019.

### **Evaluation**

16. The 2 officers of the 2<sup>nd</sup> Respondent sought to be cited admitted that the order of 22 March 2019 was served and that they partly complied with it.

17. However, on whether there was wilful disobedience, the 2 contended that they deducted and/or withheld part of the applicant's salary/allowances because he was on *suspension*, and that in terms of the 2<sup>nd</sup> Respondent's *Human Resources Management Policies and Procedures Manual*, a suspended officer is only entitled to part and not full salary.

18. It is not in dispute that *heads of finance/procurement* units who were sent on *compulsory leave* pursuant to the presidential proclamation were entitled to full salary/allowances. It is also common that the applicant's substantive position was General Manager, Finance.

19. The applicant was on *compulsory leave* until he was suspended. While on *compulsory leave* pursuant to the Presidential proclamation, the applicant was entitled to full salary/allowances.

20. The applicant was however subsequently suspended in terms of the Respondent's *Human Resources Management Policies and Procedures Manual* for not complying with the terms of the Presidential proclamation.

21. Whether the suspension was lawful or not is not relevant for now because under the *Procedures Manual*, suspension was provided for in appropriate cases.

22. In the view of the Court, the *suspension* was a distinct disciplinary issue subject to the applicant's *terms and conditions of service* which conditions include withholding of part of salary during the period of suspension.

### **Conclusion**

23. Considering that *suspension without full salary* is contemplated in the 2<sup>nd</sup> Respondent's *Procedures Manual*, the Court finds that there was no wilful disobedience with the Court orders of 22 March 2019.

24. The motion therefore fails, and is dismissed with no order as to costs.

**Delivered, dated and signed in Nairobi on this 15<sup>th</sup> day of July 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For applicant Mr. Ochich instructed by Osundwa & Co. Advocates

For Respondents Office of the Attorney General

Court Assistant Lindsey