



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2218 OF 2017 CONSOLIDATED WITH CAUSE 836 OF 2018

FRANK ESEVWE.....CLAIMANT

- VERSUS -

UNIVERSITY OF NAIROBI.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th July, 2019)

RULING

The claimant filed the two suits against the respondent as currently consolidated. In cause No.836 of 2018 the claimant filed a notice of motion together with the statement of claim dated 30.05.2018. At the time of filing Nyabena Nyakundi & Co Advocates were representing the claimant but has subsequently opted to act in person effective 15.05.2019.

By consent orders given on 04.06.2018 the suits were consolidated and the Court further ordered, “**2. That the respondent is hereby ordered to reactivate the claimant’s staff portal to allow him access medical services at the respondent’s health centers pending the hearing and determination of the application.**”

The claimant has filed on 11.12.2018 the notice of motion under rule 12 of the Employment and Labour Relations Court Act, 2011, the inherent powers of the Court and all enabling provisions of the law.

The claimant prays for the following substantive orders:

- a) That pending the hearing and determination of the suit the respondent be ordered to release the claimant’s salary and allowances forthwith.
- b) The cited persons (Vice-Chancellor Professor Peter Mbithi, Professor Stephen Kiama the respondent’s Principal College of Agriculture & Veterinary Sciences, Mr. Peter Wekesa, respondent’s Registrar College of Agriculture & Veterinary Sciences, and Mr. Peter Muturi the registrar in charge of Administration, and Finance Officer Mr. Peter Busienei) be ordered to release the claimant’s salary forthwith.
- c) That the said individuals be summoned to appear before the Honourable Court to show cause why they should not be jailed for a period of six months or such period the Honourable Court may deem fit and just to grant.
- d) That the cited persons be cited for contempt of court and sent to civil jail for a period of six months or such other period as the Honourable Court may deem fit and just to grant.
- e) That the Inspector General of Police or his authorised agents or officers do assist in the execution of the Honourable Court’s orders.
- f) The costs of the application be paid by the respondent in any event.

The application is based on the attached claimant’s supporting affidavit and on the grounds that the order “**2. That the respondent is hereby ordered to reactivate the claimant’s staff portal to allow him access medical services at the respondent’s health centers pending the hearing and determination of the application**” was issued in presence of counsel for the respondent, it was served upon the respondent, and the respondent by itself or by its agents and without reasonable justification have refused or declined to comply with the order. The orders prayed for should be granted to uphold the dignity of the Court. The exhibited affidavit of service shows that the order was served on 18.06.2018 upon the respondent’s legal officer whose name is not disclosed at all.

The claimant filed a supplementary affidavit on 10.06.2019 stating that by cell-phone communication the chairperson of the respondent’s

council has informed him that to be assisted, the claimant had to withdraw pending cases including those that the claimant has filed against the respondent alongside other staff of the respondent. Further the cited persons are the ones vested with authority to comply with the Court orders, they have not complied, and the claimant's health continues to deteriorate.

The respondent opposed the application by filing the grounds of opposition dated 27.02.2019 and through KTK Advocates. The respondent's case is as follows:

- a) The orders in issue had since expired.
- b) The application is fatally flawed as it has no basis in law.
- c) The orders were never personally served upon the cited persons.
- d) The applicant is not keen to finalise the main suit but rather engages in sideshows, consequently subverts the judicial process.
- e) The applicant is intent on dealing with the interim orders by filing multiple applications against the respondent instead of setting suits down for hearing on merits.
- f) The suits are consolidated and orders cannot issue only in one of the files.
- g) The application is frivolous, vexatious and lacks merit and ought to be dismissed.
- h) The suit and application are liable for dismissal for being an abuse of court process.

The respondent also filed the preliminary objection dated 17.06.2019 objecting to the supplementary affidavit deponed on 06.06.19 by the claimant on the grounds that the affidavit is intimidating the respondent's officials rather than advancing a legitimate cause and it is abusive of court process.

The order in issue was thus, **"2. That the respondent is hereby ordered to reactivate the claimant's staff portal to allow him access medical services at the respondent's health centers pending the hearing and determination of the application."** The Court has carefully considered the order. It is directed at the respondent. It is true that it was made in presence of counsel for the respondent and served upon the office of the respondent's in-house counsel as per the affidavit of service.

It is trite law that personal service is not mandatory and that it was sufficient that the respondent or cited persons were aware of or had knowledge of the court orders. It is true that the order was made in presence of the respondent's advocate and the respondent is deemed to be aware especially that the order was subsequently served upon the respondent's in-house legal office. Thus in **Justus Wanjala Kisiangani and 2 Others-Versus- City Council of Nairobi and 3 Others[2008]eKLR** it was held that it is trite law that any party who is aware of a court order is required to obey the same. Further, in **Kenya Tourist Development Corporation -Versus- Kenya National Capital Corporation & Another, High Court Civil Appeal No. 6776 of 1992**, Akiwumi J. held that notice of a restraining order may be given by telephone, telegram or otherwise and that suffices for purposes of enforcing the order. Akiwumi J (as he then was) followed **Halsbury's Laws of England, 4th Edition Vol.9** thus, **"Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly endorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has notice of the terms of the order either by being present when the order was made or by being notified of the terms of the order whether by telephone, telegram, or otherwise."**

The Court finds that the respondent as a corporate body was aware by reason of service upon its in-house legal office and its lawyer being present at the time the order was made by the Court. However, for the cited individuals, there is no basis for the court to make a finding that they were aware of the order. Further the Court considers that the order was directed at the respondent and there is no established reason why it should not be primarily enforced against the respondent rather than its officers. The wording of the order is clear. It was not directed at officers or agents of the respondent but at the respondent by itself. The applicant has failed to establish a nexus between the order and the cited persons and the basis for the applicant's position that the cited persons were the ones required to implement or comply or enforce the order.

For example, the Court considers that an order for sequestration would be available in a proper application as against the respondent as being primarily liable to comply, obey and enforce the order. Thus in **O'Regan, Contempt of Court and the Enforcement of Labour Injunctions, Modern Law Review, Vol54, 1991 at 401** it is stated, **"Sequestration is a remedy of the last resort in contempt cases. It is a process whereby a person in contempt of court is deprived of his or her property and that property is given to sequestrators to hold and detain in order to obtain compliance with the court order. There were four well publicized disputes which led to the sequestration of trade union assets in the 1980's"**

For the reasons stated, the Court returns that it will not delve into the other matters raised for the parties as the application will fail accordingly. As for objections raised against the supplementary affidavit, the Court considers that the rules sufficiently provide for avenues such as striking out as may be necessary and which may be available to the respondent accordingly.

In conclusion the application for contempt filed for the claimant herein is hereby dismissed with costs in the cause.

Signed, dated and delivered in court at Nairobi this Friday 12th July, 2019.

BYRAM ONGAYA

JUDGE