



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1726 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

ENG. STEPHEN MBUGUA CHEGE.....CLAIMANT

VERSUS

NAIROBI CITY WATER AND SEWERAGE COMPANY...RESPONDENT

RULING

The Claimant/Applicant, Eng. Stephen Mbugua Chege filed a Notice of Motion Application dated 31st May 2019 brought under Order LIII Rules 3(1) and 3(4) of the Civil Procedure Rules and the Judicature Act. The applicant seeks orders that this Court finds and holds the Respondent in contempt of the court orders issued on 13th November 2017 and commits the Respondent to civil jail for not more than 6 months, pending payment of arrears of salaries due to him of Kshs.15,976,579/68. He further seeks for orders that this Court denies the Respondent the audience in this matter unless it purges the contempt committed herein and for the Respondent to pay for costs of this Application together with accrued interest immediately.

The Application is based on the grounds that this Court issued an order in favour of the Applicant on 13th November 2017 directing the Respondent to reinstate and pay the applicant all his salary entitlement for the entire period he was out of employment. That on 15th March 2019, the Court expressly informed the Respondent to comply with the court orders to avoid filing of a contempt application. That the Respondent has elected to disobey the said court orders and that even the respondent's Advocates' written request has borne no response but disobedience. That it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court to obey it unless and until that order is varied, discharged and/or set aside. That the Respondent's actions are an attack on the integrity of the judicial process and the rule of law which actions must not be countenanced.

The Application is supported by the Affidavit dated 31st May 2019 sworn by the Applicant who avers that the said Court Order was extracted and directly served upon the Respondent on 14th November 2017 with the Respondent's Acting Managing Director acknowledging receipt and reinstating him on paper with back pay. That he reported back on duty but was not assigned any work for a whole 1 year until 11th March 2019 when he was reinstated to the payroll after the Respondent's attempt to lock him out were dismissed by this Court. Lastly, that the Respondent has not given any reason and/or justification for withholding his entitlement.

The Respondent filed a replying affidavit dated 4th July 2019 sworn by its Acting Human Resource Director, Margaret Benson who avers that the Court in its Ruling of 13th November 2017 ordered in the alternative that the Respondent pays the Applicant for the full contract ending 11th September 2017 pursuant to Clause 4.3.2 of the Respondent's Human Resource Policy and Procedure Manual. That upon the Respondent being reinstated back to his position as Director of Commercial Services as ordered by Court, he was paid all the back salaries, benefits and allowances and that a letter dated 17th November 2017 was sent to him informing him of the same. That the Respondent being aggrieved by the Ruling filed an application for stay orders to the Court of Appeal which is yet to be prosecuted. That even with the said letter, the Applicant reported to work on 14th November 2017, was allocated work by the Acting Managing Director but did not return to work thereafter. That she believes the Order made on 13th November 2017 placed a duty on the Applicant in mandatory terms to resume his duties but which duty the Applicant breached. That he did not file any application supporting his allegation that he reported to work but was not allocated duties.

She continues to aver that the Applicant failed to report to work because he had secured another job at Nyandarua County as Transport, Energy and Public Works County Executive Committee member as evidenced vide Kenya Gazette of 8th November 2017. That it is clear he secured the job even before Mbaru J. delivered the ruling on 13th November 2017. That the Respondent thus opted to procure the services of Ms. Rachel Ngethe to act as Director of Commercial Services. That the Applicant's demand to be paid Kshs.15,976,579.68 without working at the Respondent Company is illegal and would amount to unjust enrichment. That the Respondent is entitled to deduct wages in respect of days an employee is absent without leave or without lawful cause and that the Respondent clearly complied with the Order having reinstated

the Applicant to his previous position. That **Article 77(1) of the Constitution** bars the Applicant as a state officer from engaging in other gainful employment and she urges this Court to dismiss the Application herein with costs. She further produces the exhibit marked MT-1 which contains a copy of the Gazette Notice and copies of the Applicant's pay slips for June to August 2017.

The Applicant filed a Supplementary Affidavit dated 10th July 2019 denying that he was paid his back salaries, benefits and/or allowances as alleged by the Respondent. He states that it was not up to him to file another application as there was already a clear order and that the Respondent has no justification in refusing to pay him his dues which have accrued as a result of the injustice he has suffered. That the Respondent has violated his constitutional right to lawful expectation and cannot hide behind the same Constitution to deny him his rights.

Proceedings

The matter came up for hearing on 18th September 2019 and the Applicant's Advocate stated that the Applicant reported back to work on 17th November 2017 but was not assigned work for a whole one year, three months and that he was kept out of office as the Respondent purported to file an appeal which has never been prosecuted to date. That the Respondent reluctantly reinstated the Applicant on 15th March 2019 but failed to pay the arrears of salaries and allowances as ordered by Court and that there is no evidence that the same was paid as alleged. That the Applicant on his part has attached the salaries he has received since March 2019. Further, that there is no evidence that the Applicant was allocated duties. He urged this Court to find that the Respondent has refused to comply with the Court order and orders the Managing Director to appear in court for the purpose of sentencing.

The Respondent's Advocates in opposing the application relied on the replying affidavit of Margaret Benson and submitted that for the court to find there was contempt it must be shown that the Respondent never complied with any of the orders. That the Applicant has not denied taking up the job at Nyandarua County and has acknowledged he was employed by the said county. That what the Claimant is asking for relates to salaries and allowances for the period between September 2017 and March 2019, during which period he has admitted that he was working at Nyandarua County Government. That the Applicant cannot be paid for the period he was employed elsewhere.

Counsel relied on the provisions of **Section 17(1) of the Employment Act** on deduction of wages of an employee who absconds duty. To buttress its case, Counsel relied on the case of *Regine Bhutt v Haroon Bhutt and another* where the court has stated that there is no provision for a state officer to participate in any gainful employment. The respondent also relied on the case of *Ben Nandasaba Muiyundo vs. Ideal Security Services* where the court decided that a claimant is under duty to prove that he reported back to work immediately he was reinstated. That the case of *Kariuki Njuguna v AG* highlights the provisions of **Section 19(1)(c) Employment Act** which require an employer to deduct wages of any employee who did not work. That there is no letter complaining about the non-payment until 18th March 2019 when presumably the Applicant opted out of employment of Nyandarua County Government and reported to work. That the claimant never thought of moving the court for a whole year because he was comfortably employed as a state officer. The respondent urged this Court to find that the Application was filed in bad faith and should be dismissed with costs.

In a rejoinder, the Applicant's Advocate submitted that one cannot choose to obey one order and leave the other. That if the Respondent chose to reinstate, it must pay. That between November 2017 and March 2019 there was an attempt to settle this matter and that the Applicant has shown the mitigating action he took by getting employed by Nyandarua County. That the Respondent should have come back to court to report that the Applicant was not available for reinstatement. That if he was earning a salary in Nyandarua then the respondent should do reconciliation and pay what is due. That as long as this order remains in court and as long as he is working for the Respondent, the claimant is bound to be paid. Counsel urged the Court to appraise itself as to what the record says and find merit with the arguments of the Claimant/Applicant.

Determination

The circumstances of this case are unique. The applicant's employment was terminated by the respondent by letter dated 17th August 2017. He then filed the instant suit and by a ruling dated 13th November 2017, the court reinstated him back to his former employment with an option for compensation. The court ordered as follows –

- a) The letter dated 17th August, 2017 by the respondent to the claimant is hereby quashed the same being null and void;***
- b) The claimant shall resume his duties with the respondent as Director – Commercial Services on 13th November, 2017 at 2.00 pm [1400 hours] for allocation of office and duties by his line supervisor and the Managing Director of the respondent;***
- c) Such reinstatement is with all back salaries, benefits and allowances***
- d) Costs of the suit.***

In the alternative

- a) 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) Such payments shall be within 30 days from the date hereof;***
- c) Costs of the suit.”***

The applicant failed to report back to work even after the respondent wrote him a letter dated 17th November 2017 informing him that he had been reinstated. The letter is reproduced below –

NCWSC/HRD/VOLI/886/MNT/vn

17 November 2017

Eng. Stephen Mbugua

P.O Box 59014 – 00200

City Square – Nairobi

Dear Eng. Mbugua,

RE: REINSTATEMENT TO EMPLOYMENT

Reference is made to Employment and Labour Relations Court (ELRC) Cause No. 1726 of 2017 – Eng. Stephen Mbugua Chege – claimant versus Nairobi City Water and Sewerage Company – respondent.

Based on the order given, the company hereby reinstates you to employment with all back salaries, benefits and allowances.

You are therefore required to report back and resume your duties immediately.

SIGNED

Eng. Nahason Muguna

Ag. Managing Director”

The claimant was not able to report to work as directed by the court on 13th November 2017 as he had by Gazette Notice No. 10933 been appointed County Executive Committee Member for Transport, Energy and Public Works by the Governor, Nyandarua County Government with effect from 7th November 2017.

According to the respondent, the applicant reported back to work on 14th November 2017 and was allocated duties. He however did not return to work thereafter until 11th March 2019. The Applicant has not denied these averments.

It appears that the current application was only filed after this court’s ruling of 15th March 2019 dismissing the respondent’s application for review of the ruling by Mbaru J. The application herein was filed on 3rd June 2019.

The further, the applicant has not given a breakdown of the Shs.15,976,579.68/= that he claims the respondent has failed to pay. There is no judgment or order for payment of the said amount. The applicant has not denied receiving payment up to the date of the court’s ruling of 13th November 2017. He has further not denied that he did not work thereafter until 11th March 2019.

In his tabulation, the applicant does not acknowledge what he has been paid. He has further not acknowledged the period he was away working as Member of County Executive Committee of Nyandarua County.

Contempt is a quasi-criminal charge and the burden of proof is higher than that of balance of probabilities in civil matters. As was held in the case of **Gatharia K. Mutikika vs Baharini Farm Limited (1985) KLR 227:-**

"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..."

Again it was held in the case of **Katsuri Limited -V- Kapurchand Depar Shah (2016) eKLR**, that –

“As pointed out earlier, in an application of this nature we are dealing with the liberty of a person and such an order ought to be granted in the clearest circumstances as evidently demonstrated by the authorities cited herein. In the instant application I am not satisfied that that standard of proof has been attained...”

In the instant application, the respondent is alleged to have disobeyed a court order of 13th November 2017, which as I have set out above, did not require it to pay Kshs.15,976,579.68. There is no decree for the said amount. There is even no demand for the said amount. I think I would be safe to say that such an order is non-existent and that the applicant seeks to punish the respondent for disobeying an order that does not exist.

Further, the applicant has admitted that he respondent wrote to him the letter dated 17th November 2017, which in effect constitutes compliance with the court orders of 13th November 2017.

The foregoing notwithstanding there is another problem with the prayers in the applicant’s application. He seeks to hold the respondent Nairobi City Water and Sewerage in contempt of court orders and the committal of the said respondent to civil jail. Obviously, Nairobi City Water and Sewerage is not the respondent. The respondent is Nairobi City Water and sewerage Company. It is not an animate person. It is not capable of committing contempt or of being committed to civil fail. This makes the application incapable of being complied with, as the court cannot give orders in vain.

From where I sit, I find the applicant an extremely lucky person. He was reinstated back to work and technically absconded duty while working elsewhere. He should be grateful that after his sojourn working as Member of County Executive Committee of Nyandarua County Government, which was technically a repudiation of his employment contract following his reinstatement by letter date 17th November 2017, the respondent still agreed to take him back. He has absolutely no claim to salary for the period from 17th November 2017 to the date he resumed duty on 11th March 2019. His application is therefore an attempt to unjustly enrich himself and borders on abuse of court process.

For the foregoing reasons, I find no merit in the application and dismiss the same with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE