



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. 48 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 18th December, 2019)

ZACHARIA OBATI MUNAYI.....EX-PARTE APPLICANT

-VERSUS-

THE KENYA SCOUTS COUNCIL.....RESPONDENT

RULING

1. The Applicant filed an Amended Chamber Summons on 29th May, 2019 seeking the following orders:-

1. Spent

2. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to stay the decision of the Respondent dated 18th April, 2019 purporting to redeploy the Applicant and/or removing him from his position of the Respondent's Nation Youth Programme Executive;

3. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to grant orders restraining the Respondent, its organs, representatives, agents and/or employees from suspending from employment , redeploying , demoting , re-assigning and/or removing him from his position as the Nation Youth Programme Executive;

4. THAT the applicant be granted leave to apply for an order of prohibition directed to the Respondent, its representatives, agents , and/or any other employees of the Respondent and the Kenya Scouts Association be stopped from redeploying, demoting , re-assigning and/or removing him from his position as the Nation Youth Programme Executive;

5. THAT the Applicant be granted leave to apply for an order of certiorari to bring to this Court the decisions by the disciplinary panel constituted by the Chief Commissioner, the decision by the National Scouts Board and the National Executive Commissioner for quashing.

6. THAT the leave so granted act as stay of the Respondent's decision dated 18th April 2019 seeking to redeploy the Applicant to the camps department in the capacity of Camp Manager, Embu Scouts Centre.

7. THAT the Court gives any other orders it deems just and equitable.

8. THAT the costs of this Application be in the course.

2. The application is based on grounds that:-

1. On 12th November, 2018 the Applicant received communication from the National Executive Commissioner on allegations of misconduct on his person, which allegations were fallacious, defamatory and extreme malice on the part of the complainants.

2. On receiving the complaints, the Chief Commissioner appointed a disciplinary panel to investigate and make recommendations against the Applicant. The panel in its report stated that the allegations made against him did not meet the threshold for any disciplinary action to be taken against the Applicant bur recommended that the applicant be suspended for one month and pay back the lost amounts of be issued with a warning letter and made to pay back money lost.

3. The panel was biased against the applicant as he was not accorded time to present his defence. The Applicant complained to the Respondent about the conduct of the proceedings of the panel and requested for an impartial panel to hear the matters

raised against him but the Respondent refused to respond or act on his request. On 21st January, 2019 the National Scout's Board in total disregard of the recommendations sent to it by the panel sent him on a 3 months suspension with half basic pay and redeployment after the completion of his suspension.

4. The decision by the Scouts Board to discipline him was in excess of its jurisdiction, unreasonable and was full of procedural impropriety as he was denied a right to fair hearing and fair trial before the disciplinary panel and Scout's Board.

5. The applicant has been on suspension for approximately 6 months contrary to the Respondent's Policy on Ethic, Standards , Quality Assurance and Awards Policy of 2016 which prescribes the maximum period of suspension as 1 month.

6. The Applicant was appointed to the position of National Youth Programme Executive on Job Group 7 on 1st July, 2018 and as he awaited a response to the letter requesting for a fair hearing before an impartial tribunal , the Respondent sent him a letter dated 18th April, 2019 redeploying him to the position of Camp Manager Embu Scouts Centre which was biased and disputed disciplinary proceedings.

7. There is only one position of the National Youth Programme Executive which is the position that he holds thus he cannot be redeployed. Since there is no position for the re-deployment of the Applicant, he prays that this Court does stall such constructive termination from the position of National Youth Programme executive, which was conducted without following due process.

8. Unless restrained by this Court from further harassment of the applicant, the Respondent shall continue serving the Applicant with letters of intimidation, blackmail and interference with his duties as the National Youth Programme Executive.

3. The Applicant only filed a Supporting Affidavit to its initial Chamber Summons sworn on 24th April 2019 in which he reiterates the grounds on the face of the Chamber Summons.

Respondent's Case

4. The Respondent filed a Replying Affidavit sworn by Victor Radio, its Chief Commissioner, on 3rd June, 2019. He deposes that the findings of separate individuals one being a Scout Leader and the other a Scout Patron were that there were actual acts or omissions of the Applicant as a result of his misconduct, underperformance and misappropriation of the Respondent's funds.

5. He avers that the Applicant attempts to deceive this court by covering his tracks in respect of the events that occurred in Uganda to ensure that no fingers are pointed at him and that the issues were merely minor mistakes with no particular individual being at fault.

6. He deposes that the Applicant's promotion to the position of National Youth Programme executive was not because of the outcome of the Zonal East African Scouts Competition but procedural as the Applicant's previous contract was in an acting capacity in the same position and the position needed to be filled.

7. With respect to the disciplinary proceedings against the Applicant, he avers that the decision of the board was a mere recommendation to which a final decision was resolved to redeploy the Applicant after 3 month's suspension on half pay. He further avers that the board was of the view that the panel's recommendation was not deterrent enough.

8. He avers that before the final decision of the board was made, it took over 6 months from June 2018 to January 2019 for investigations to be carried out and the Applicant accorded a fair hearing. He contends that the Respondent's role was to guarantee a fair process as per the laid down procedures and not a guaranteed outcome for the Applicant.

9. He avers that the decision of the panel was merely a recommendation to the board and was not binding upon it as it had a chance to give its reactions and come up with a final decision as it did.

10. He avers that there being a board decision which was communicated to the applicant, the respondent could not engage him further on the issues it would be tantamount to reviewing the decision of the Board which he had no right to do.

11. The parties filed a Consent on 19th September, 2019 which was adopted as an order of the Court on even date. The parties agreed that the Applicant be paid his 22 months' salary and that his employment contract be deemed as mutually terminated.

12. However, the parties agreed that the issue of costs and an apology letter from the Respondent to the Applicant would be determined by the Court upon parties filing their respective submissions to these two issues.

Applicant's submissions

13. The Applicant submits that the section 12 (4) of the Employment and Labour Relations Court Act and Rule 29 of the Employment and Labour Court (Procedure) Rules 2016 provide that the Court may order payment of costs.

14. He submits that costs follow the event being that the party that filed a suit if not successful should cater for costs of the defence. In support of this, he relied on the Supreme Court decision in **Geoffrey M. Asanyo & 3 others v Attorney General [2018] eKLR and Cecilia Karuru Nyayu v Barclays Bank of Kenya & another [2016] eKLR.**

15. The Applicant submits that the Court in **Cecilia Karuru case** provided a criteria for making a decision on awarding costs which include; the conduct of the parties, subject of litigation, the circumstances which led to the institution of the proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst disputing parties.

16. He submits that he has never been guilty of any delays in the process of the suit and the subject of litigation is as a result of infringement of a number of rights and that the Respondent approached the Applicant with an offer which was not accepted as it failed to cater for costs of the suit. In addition, the matter was at the submissions stage when the parties reached a consent. He submits that he has met the threshold to be awarded costs of his claim against the Respondent.

17. In respect of the issue of an apology letter, he applicant submits that the major accusation which he seeks an apology borders on the defilement of a minor and having sexual relations with a scout leader. He submits that these accusations were not proved and no commissioner of the Respondent gave evidence to show indeed the Applicant committed those acts.

18. He submits that the allegations of sexual harassment have the capacity to blot ones career and that such references should attract damages. He submits that the statement was defamatory thus it is of importance that the Respondent does apologise to the Applicant.

Respondent's submissions

19. The Respondent submits that if parties enter into a consent/compromise it is only just and fair that each party bears its own costs for the reason that this is a form of Alternative Dispute Resolution.

20. It relied on Section 27 of the Civil Procedure Act that provides that costs and incidental to suits shall be in the discretion of the Court. It further relies on Halsbury's Laws of England 4th Edition Re-issue (2010) Vol. 10 at paragraph 16 which states that where costs are in the discretion of the Court, a party has no right to costs unless and until the court awards them to him.

21. It submits that reaching a consent means that parties have reached an unimpeached compromise that represents the end of the dispute or disputes from which it arose. It also relies on the case of Geoffrey M. Asanyo [supra] and **Rufus Njuguna Miringu & another v Martha Muriithi & 2 others [2012] eKLR.**

22. It submits that it honestly believes that it does not owe the Applicant an apology as it acted within the law and in accordance with the rules of natural justice in carrying out disciplinary action. Further, that the said disciplinary action was as a result of the outcome of a fair hearing of the Applicant and after he was given a chance to defend himself.

23. It further submits that a Court cannot award a party that which it has not prayed for in its pleadings as is the case herein. In addition, and that the Court should confine its decision to the questions raised in the pleadings. It therefore submits that the Applicant is not deserving of either costs or an apology.

24. I have considered the averments of both Parties. The only issue for this Court's consideration is who bears costs of this suit Parties having entered a consent.

25. From the consent, the Respondents agreed to pay the Claimant salary of 22 months and agreed to sever their relationship with him. In essence, the Claimant won this case and since costs follow the event, I find the Claimant/Applicant is entitled to costs of this suit to either be agreed upon or be taxed. Those are orders of the Court.

Dated and delivered in open Court this **18th day of December, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Omwanza for Applicant – Present

Araka holding brief for Jesse for Interested Party – Present