



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 291 OF 2018**

**OSMAN ALI FANKEY.....CLAIMANT**

**VERSUS**

**NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT**

**INSPECTOR GENERAL NATIONAL POLICE SERVICE.....2ND RESPONDENT**

**DEPUTY INSPECTOR GENERAL ADMINISTRATION.....3RD RESPONDENT**

**HON. ATTORNEY GENERAL.....4TH RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 6th December, 2019)

**RULING**

The claimant filed an application on 09.05.2019 by way of a notice of motion through Hassan Bulle & Company Advocates. The application was under section 5(a), (b) and 28(1) of the Contempt of Court Act 2016, section 3A of Cap 21, and Order 51 Civil Procedure Rules 2010. The claimant prayed for orders:

- a) That the 1st, 2nd, 3rd, and 4th respondents be cited for contempt of Court orders made on 13.03.2018 and issued the same day.
- b) That the 1st, 2nd, 3rd, and 4th respondents be committed to civil jail for a period of 6 months and any other period the Court deems fit from the time of granting the order.
- c) That the applicant is awarded costs of the suit.

The application was based on the claimant's annexed affidavit, his further affidavit filed on 22.10.2019 and his further replying affidavit filed on 21.11.2019. The claimant's case is as follows:

- a) On 13.03.2018 the Court ordered thus, **"2. That the parties are encouraged to compromise the suit and the application. 3. That pending the interpartes hearing or further orders by the Court the respondents to retain the applicant in employment at the prevailing rank, pay and benefits without termination of his services on account of attainment of retirement age."**
- b) The orders were served upon the respondents on 14.03.2018 and all the respondents have disobeyed the order of the Court to retain the applicant in employment in the prevailing rank, pay and benefits without terminating his services on account of attainment of the age of retirement.
- c) The orders were served and the respondents are aware of the orders.
- d) For over a year the respondents have adamantly refused or neglected to obey the Court orders and despite several reminders to obey.
- e) The respondents have taken no steps to compromise the suit as was ordered by the Court.
- f) On 10.07.2018 the 1st respondent wrote to the 3rd respondent to comply with the Court orders given on 13.03.2018 but there had been no compliance. Thus the 3rd respondent had refused to comply and the claimant has continued to suffer.

g) On 16.10.2019 the application for contempt was fixed for hearing and the advocate for the 2nd and 3rd respondent informed the Court that they were conducting an investigation on how the claimant had been registered as a person with disability and claiming that the registration was fraudulent and a report would be filed in Court.

h) The claimant followed due process to get registered as a person with disability and allegations of fraudulent registration are aimed at defeating the orders given on 13.03.2018.

i) The 3rd respondent has unilaterally constituted himself into roles of an investigator, jury and judge in issuing the letter dated 19.02.2019 asking the Director of Criminal Investigations to investigate an alleged fraudulent registration of the claimant as a person with disability. The allegations by the 3rd respondent who is a party to the suit should therefore be disregarded and the report that the claimant was allegedly registered as a person with disability fraudulently should be disregarded. The 3rd respondent is not independent and objective being a party to the suit.

j) The claimant has never retired from the National Police. He was due to retire on 30.06.2017 upon attaining the age of 60 years. In June 2015 he was involved in a serious accident while on duty and he sustained injuries on his right leg. He was treated over a period of 5 months. The hospital declared him a person with disability. He presented the finding to the National Council for Persons with Disabilities and was duly registered on 02.12.2015 as a person with a physical disability under Ref. No. NCPWD/P/383388. The Kenya Revenue Authority has since implemented the law on persons with disability by exempting the claimant's income up to initial Kshs.150, 000.00 from income tax for a period of 5 years effective 01.01.2017.

k) Under the applicable public service policy, an officer with disability shall retire upon attainment of 65 years of age and the claimant is entitled accordingly. The claimant is due to retire on 30.06.2022 and not 30.06.2017 as earlier scheduled.

l) The claimant continued to work and he continued to earn until in February 2018 when he did not receive his salary. At all material time he was deployed at Kigumo Sub-County Administration Police Service in Murang'a County.

m) The Court order of 13.03.2018 should therefore be obeyed and specifically performed.

The 2nd and 3rd respondents opposed the application by filing the replying affidavits of Paul Ndirima, Assistant Director of Human Resource Management in the Administration Police Service sworn on 26.07.2019 and 17.10.2019 respectively. The 2nd and 3rd respondents oppose the application upon the following grounds:

a) The claimant retired from the service on 01.07.2017 after voluntarily signing documents for computing and processing his pension and was deleted from the payroll Data (IPPD).

b) The processing of the claimant's pension is on-going at the Pensions Department of Treasury.

c) The respondents are aware that the claimant tripped and fell down on the way to his residence on 09.06.2015 and he suffered a fracture on his right leg. The incident was reported to the 3rd respondent by the letter dated 13.06.2019 requesting that compensation of the claimant for injuries sustained be processed. The report stated in part, **"It was on 9/06/2015 at around 01945hrs at Kigumo ward of Kigumo Sub County one P/no. 1978071693 (SP) Osman A. Fankey the Sub County Ap commander Kigumo tripped and fell when he was returning to his house after a security brief with OCPD Kigumo, thereby fracturing his right leg. He also suffered minor tissue bruises as on the doctor's examination report. The officer was helped and his leg was plastered, (plaster to be removed on 4th august 2015). He is still undergoing and receiving house care as he cannot walk awaiting the removal of the plaster. He is in stable state of health."**

d) The medical assessment report by Dr. Kahenya P.N.P dated 21.10.2015 stated that the claimant fell on 09.05.2015 and sustained fracture right upper tibia and fibula and POP was used to immobilize the fracture. The report further stated that the claimant still had occasional right leg swelling and pain and he was to be compensated at 15%. At paragraph 7 of the replying affidavit of 26.07.2019 it is stated thus, "It is considered opinion of the Service that such percentage is too low to warrant one being registered as a person living with disability. Further it is stated at paragraph 8 of the replying affidavit that Persons With Disabilities Act No. 14 of 2003 define disability as a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability which impacts adversely on social, economic or environmental participation. At paragraph 9 of the replying affidavit it is stated that in the opinion of the Administration Police Service the injuries sustained and suffered by the claimant did not thereby physically incapacitate him or adversely impact performance of his duties to necessitate the impetus for registration as a person with disability as is the constitutional threshold. Further it was suspected that the registration was obtained fraudulently. Thus the Service had written to the Director of Criminal Investigations on 19.02.2019 to investigate the matter. The investigation was concluded on 07.10.2019 and the duplicate file forwarded to the Office of the Director of Public Prosecutions (ODPP) for perusal and directions. The ODPP has replied by the letter dated 16.10.2019 stating that the file had been independently reviewed and concurs that the evidence contained therein is sufficient to sustain a charge of obtaining registration by false pretences contrary to section 320 of the Penal Code against the claimant as a suspect. Further that the claimant should be apprehended and presented before court for plea taking and prosecution. There is no evidence of the prosecution having been commenced.

The 2nd and 3rd respondent filed submissions through learned Senior Litigation Counsel Christine Oyugi. The 1st respondent filed submissions through learned Legal Counsel Sarah Muthiga. The claimant filed submissions through Hassan Bulle & Company Advocates. The Court has considered the submissions and the parties' respective positions on the application and returns as follows.

**First**, there is no dispute that the Court gave the orders on 13.03.2018, the respondents were served and they are all aware of the terms of the orders.

**Second**, it is clear and is submitted for the 1st respondent that upon being served the orders, the 1st respondent issued the letter dated 10.07.2018 advising that in view of the Court order the claimant be reinstated back into the payroll in compliance with the court directive in order to avoid contempt of court proceedings being instituted against the Service and the Commission. The letter was addressed to the Deputy Inspector General of Administration Police Service. Accordingly, the Court returns that the 1st respondent, its Chairperson, members and officers cannot be held in contempt of the Court orders given on 13.03.2018 because it has clearly issued advisory and instructions towards compliance. The Court finds that the application will fail as against the 1st respondent.

**Third**, the applicant has not shown anything of omission or action on the part of the 4th respondent that constitutes contempt of the Court order given on 13.03.2018 and the Court returns that the 4th respondent will therefore not be found culpable as alleged and prayed for in the application.

**Fourth**, the 1st respondent submits that in view of the criminal investigations and the ODPP's decision that the claimant be prosecuted on whether the registration of the claimant was genuinely acquired or fraudulent, the orders of 13.03.2018 should be discharged. In any event, it is urged that the claimant will not suffer any prejudice because his losses would be compensated by money. The 2nd and 3rd respondents submit that the claimant had retired effective 01.07.2017 having been served with a notice to retire on 26.01.2016. The Court considers that the issue whether the claimant had retired and commenced processing of his pension and whether subsequent to his registration as a person with disability he followed due procedure to continue in the Service are matters which shall be resolved after full hearing of the suit and based on the relevant parties' evidence. The Court further considers that the ODPP having communicated its decision that the claimant be prosecuted in that regard is a serious mitigating factor in the claimant's case for contempt. The Court has revisited the terms of the order given on 13.03.2018. It was that parties were encouraged to compromise and the order for respondents to retain the claimant was made pending inter partes hearing or further orders by the Court. Parties appeared in Court and they recorded consent orders suggesting progress towards compromise. On 14.05.2018 by consent of the parties the application dated 12.03.2018 was dispensed with the orders that the interim orders were extended till hearing and determination of the suit. Thereafter the contempt application was filed. Thereafter orders were made that parties may compromise the contempt application. Parties recorded consent orders towards recording consent on the application for contempt. The issue of the on-going investigations was reported to the Court and parties were granted leave to file further affidavits. The Court has considered the Court proceedings. The intention of the parties was that there would be a compromise and that they reckoned that there were related investigations that impaired or informed the implementation of the order. Taking into account such circumstances, the Court finds it unjustified to make a finding of contempt of the Court orders on the part of the 2nd and 3rd respondents.

While making that finding the Court has considered the holding by Ndolo J as relied upon by the claimant and the respondents in the cited case of **Teachers Service Commission –Versus- Kenya National Union of Teachers & 2 Others [2013]eKLR**, thus, **“The reasons why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of Justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguards the rule of law.”**

In the present case, it is clear that the parties set out to compromise the suit then the contempt application within a framework and circumstance that the 2nd and 3rd respondents had initiated the criminal investigations in issue. Such compromises reduced into consent orders on record and informing directions in the suit show that there was no intention on the part of the 2nd and 3rd respondents to disobey the Court order or that in any event that serves as a disclosed reason and defence for failure to comply. In such circumstances it cannot be said that the 2nd and 3rd respondents set out to disobey the order and therefore defeat the rule of law. Further the Court considers that the consent orders to compromise amounted to clear parties' intention that the orders as given would be implemented one way or the other within such compromise so that timelines on compliance were thereby adjourned.

**Fifth**, the Court returns that there is no basis and no application to set aside the interim orders on record as given on 13.03.2018 and which in any event were subsequently, by consent of parties as recorded in Court on 14.03.2018, to apply until hearing and determination of the main suit. The Court will not interfere. Nevertheless, it is clear that the ODPP has directed that the claimant be prosecuted. Such prosecution may have an impact on the dispute one way or the other and which may, in the opinion of the Court, be resolved after taking the evidence at full hearing. While making that finding the Court has as well considered that the criminal justice process is distinct from the present civil suit. The Court has also considered that in the fullness of time the suit will be heard and depending with the outcome and the interim orders on record, it should be possible to place the claimant in near full compensation by the accruing payments being implemented accordingly. To balance justice for the parties and in the unique circumstances of the application the Court finds that there will be stay of implementation of the relevant interim orders herein till further orders by the Court. The costs of the application will be in the cause. In conclusion the claimant's application dated 24.05.2018 and filed on 31.05.2018 is hereby determined with orders: (a) There is stay of implementation of the relevant interim orders herein till further orders by the Court. (b) Costs of the application in the cause.

**Signed, dated and delivered in court at Nairobi this Friday, 6th December, 2019.**

**BYRAM ONGAYA**

**JUDGE**