



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 130 OF 2017

PURITY MWIRIGI.....CLAIMANT

v

NATIONAL INDUSTRIAL TRAINING AUTHORITY.....1st RESPONDENT

PUBLIC SERVICE COMMISSION.....2nd RESPONDENT

RULING NO. 3

1. On 25 January 2017, Purity Mwirigi (applicant) who had been employed as Manager, Supply Chain sued the National Industrial Training Authority (1st Respondent) and the Public Service Commission (2nd Respondent) and she stated the Issues in Dispute as

- (a) Wrongful and unfair dismissal
- (b) Reinstatement.

2. Filed together with the Memorandum of Claim was a motion under certificate of urgency seeking interim injunctive relief restraining the 1st Respondent from recruiting a Manager Supply Chain pending the determination of an appeal preferred to the 2nd Respondent by the applicant. The applicant also sought a reinstatement in the interim.

3. Mbaru J before whom the application was placed on 24 April 2017 certified it urgent and directed that it be served for *inter partes* hearing on **2 February 2017**.

4. On 2 February 2017, the judge placed on hold any recruitment process to replace the applicant pending the Respondents filing responses to the motion whose hearing was rescheduled to 20 February 2017.

5. The hearing did not proceed on 20 February 2017 as the applicant sought for more time to file a further affidavit.

6. The hearing was rescheduled to 8 March 2017.

7. In a ruling delivered on 24 April 2017, the Court declined to grant the orders sought, but instead ordered the 1st Respondent to furnish the 2nd Respondent with all necessary documentation in order to process and determine the appeal which had been preferred by the applicant to it against her dismissal by the 1st Respondent.

8. The Court gave the 2nd Respondent 45 days to determine the appeal.
9. In its determination, the 2nd Respondent found the dismissal unmerited and directed that the applicant be reinstated.
10. On 10 October 2017, the applicant filed a certificate of urgency (without an accompanying application) in order to secure further directions on the basis that the 2nd Respondent had determined the appeal (with a recommendation of reinstatement).
11. When the file was placed before Mbaru J on 24 October 2017, the Judge informed the parties that she would issue directions on 29 December 2017.
12. After hearing addresses from the parties on 29 December 2017, the Court gave directions out of which orders in the following terms were extracted
 1. **THAT** the Claimant be and is hereby reinstated back to her position.
 2. **THAT** the suit herein addressing the question of summary dismissal is now dealt.
 3. **THAT** with the appeal by the Claimant to the 2nd Respondent now allowed the Claim is hereby allowed to the extent that the Claimant is hereby Reinstated back to her position and letters dated 27/4/16 and 28/4/16 be and are hereby set aside.
 4. **THAT** the Claimant be and is hereby reinstated with all back wages, allowances and benefits.
 5. **THAT** Claimant is awarded costs of the suit at 506 (*sic*).
 6. **THAT** the Claimant shall report on duty at 8.30 hours on 2/1/2018 to the 1st Respondent's Director General for allocation of office and her duties.
13. The ruling/orders of the 29 December 2017 prompted the 1st Respondent to file a Notice of Appeal on 4 January 2018.
14. It also moved this Court on 15 January 2018 seeking
 1. ...
 2. **THAT** pending the hearing and determination of this application this Honourable Court be pleased to stay the implementation of the orders delivered on 29th December, 2017 in *Nairobi ELRC Civil Case No. 130 of 2017 Peter Mwirigi vs National Industrial Training Authority* by Hon Lady Justice M. Mbaru.
 3. **THAT** the orders delivered by Hon. Justice M. Mbaru on 29th December, 2017 in *Nairobi ELRC Civil Case No. 130 of 2017 Peter Mwirigi vs National Industrial Training Authority* be reviewed with a view of setting it aside by this Honourable Court.
 4. **THAT** this Honourable Court be pleased to grant any other orders that it deems fit and just.
15. On 16 January 2018, I directed that the application be served and hearing was scheduled for 23 January 2018, but because the Claimant had not filed responses it was pushed to 31 January 2018.
16. The Claimant filed a replying affidavit in opposition to the motion on 23 January 2018, and arguments were taken as scheduled.
17. Order 2 of the motion as worded has lapsed (it sought an ex parte order which was not granted) and

the Court therefore need not consider it in this ruling. In that regard the substantive issue for the Court's determination is the order for review/setting aside as proposed in order 3.

18. In seeking the review, the 1st Respondent contended that it had already recruited another person to the position of *Manager, Supply Chain Management* and therefore it could not comply with the order to reinstate the applicant; that the Court gave final orders when what was sought were directions; that it was not heard during the appeal process by the 2nd Respondent; that the decision of the 2nd Respondent was not final and that the parties were not afforded an opportunity to be heard before the orders of 29 December 2017.

19. In opposing the application, the applicant contended that the 1st Respondent had not invoked the review jurisdiction of the Court correctly as the application was based on the Civil Procedure Rules and not the Rules of this Court; that having preferred an appeal, it was not open to the 1st Respondent to seek review of the same decision; that the 1st Respondent had not outlined the particular ground it was relying on to seek review; that the Court was being asked to sit on appeal of its own decision; that parties were afforded an opportunity to be heard and that the 1st Respondent filed grounds of opposition which it urged on 29 December 2017 and that the recruitment of her replacement was after the 2nd Respondent had notified the 1st Respondent that her appeal had been allowed.

20. It is not in dispute that the 1st Respondent filed a *Notice of Appeal* on 4 January 2018 and the instant review application on 15 January 2018.

21. The Claimant without citing any precedent urged that it was not open to the 1st Respondent to file both an appeal and seek review.

22. However, there is precedent in support of that submission.

23. In *Kisya v Attorney General* (1996) eKLR the Court of Appeal quoted with approval a passage in Sarkar on the Law of Civil Procedure, 8th Edition, at page 1592 that

The crucial date for determining whether or not the term of 0.47 r. 1 are satisfied is the date when the application for review is filed. If on that date no appeal has been filed, it is competent for the Court to dispose of the application for review on the merits notwithstanding of the pendency of the appeal subject only to this, that if before the application for review is finally decided, the appeal itself has been disposed of, the jurisdiction of the court hearing the review would come to an end.....Review application should be filed before the appeal is lodged. It if is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with.....A review application is incompetent after appeal is preferred.

24. The legal principle emerging from the passage and decision by the Court of Appeal is that where an appeal has already been preferred, it is legally imprudent to pursue a review from the Court whose decision has been appealed. In my view, that principle is still sound law even in this Court.

25. On that singular ground, the Court would find the instant motion incompetent, as the Respondent preferred an appeal to the Court of Appeal before moving this Court invoking its review jurisdiction.

26. However, the Court also wishes to observe that the 1st Respondent did not outline with clarity under which of the limbs for review it was relying (error on the face of the record, discovery of new matter of evidence or such sufficient reason) but rather presented general grounds and arguments.

27. With all due respect to the 1st Respondent, if the Court committed errors of law or procedure in

ordering reinstatement when it was not merited, or made orders without affording it an opportunity to be heard, then those are grounds for an appeal, and not review.

28. In consideration of the above, the Court finds no merit in the application dated 15 January 2018 and orders that it be dismissed with costs.

Delivered, dated and signed in Nairobi on this 23rd day of February 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Njomo instructed by Kamotho Njomo & Co. Advocates

For 1st Respondent Mr. Kiptum instructed by Sing'oei Murkomen & Sigei Advocates

For 2nd Respondent Mr. Motende, Office of the Attorney General

Court Assistant Lindsey