



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 25 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF AN APPLICATION BY DR. GABRIEL MUKURIA MUTURI FOR
ORDERS OF CERTIORARI AND MANDAMUS**

BETWEEN

REPUBLIC.....APPELLANT

VERSUS

THE DIRECTOR KENYA FORESTRY

RESEARCH INSTITUTE (KEFRI).....RESPONDENT

DR. JANE WANGU NJUGUNA.....INTERESTED PARTY

EX-PARTE: DR. GABRIEL MUKURIA MUTURI

RULING

The application before me for determination is dated 9th November 2017 and seeks the following orders:-

1. That this application be certified as urgent and fit to be heard forthwith.
2. That the applicant is therefore seeking for leave for an order of Certiorari moving the Employment and Labour Relations Court for purposes of being quashed the decision of Kenya Forestry Research Institute (KEFRI), the respondent herein to appoint the interested party to the position of Senior Deputy Director Research and Development made on 12th September 2017.
3. That this Honourable court be pleased to grant leave to apply for an order of mandamus against the respondent compelling it to re-advertise afresh the position of Senior Deputy Research and Development for the purpose of fresh recruitment.
4. That the leave sought to operate as a stay of the decision of the 1st respondent in the appointment of the interested party for the position of Senior Deputy Director Research and Development made on the 12th September 2017 ending hearing and determination of this application.

5. That the costs of this application be provided for.

The Application is supported by the affidavit of DR. GABRIEL MUKURIA MUTURI, the Ex Parte applicant and the grounds on the face thereof.

The orders that the applicant alleges were disobeyed are the following-

1. That leave be and is hereby granted for an order of Certiorari moving the Employment and Labour Relations Court for purposes of being quashed the decision of Kenya Forestry Research Institute (KEFRI), the respondent herein to appoint the interested party to the position of Senior Deputy Director Research and Development on 12th September 2017.

2. That leave be and is hereby granted to apply for an order of mandamus against the respondent compelling it to re-advertise afresh the position of Senior Deputy Research and Development for the purposes of fresh recruitment.

3. That the leave granted do operate as a stay of the decision of the 1st respondent in the appointment of the interested party for the position of Senior Deputy Director Research and Development made on the 12th September 2017 pending hearing and determination of this application.

Both the Respondent and the Interested Party filed replying affidavits opposing the application. In the replying affidavit of BEN CHIKAMI, the Director of KEFRI, the Respondent sworn on 14th November 2017 he deposes that he was never personally served with the orders he is alleged to have disobeyed as provided in section 30(3) of the Contempt of Court Act. He deposes that a bound copy of pleadings consisting of a Certificate of Urgency, Chamber Summons and Statement all dated 6th October 2017 and an undated and unsworn affidavit verifying the facts as well as an order were served on the KEFRI Registry on 11th October 2017. He further deposes that he was never given notice of 30 days as provided in section 30(2) of the Contempt of Court Act.

CHIKAMI deposes that the Interested Party was recruited by the KEFRI Board following a competitive process in which both the Ex Parte Applicant and the Interested Party participated. He further deposes that he only acted on the orders of the Board of KEFRI when he wrote a letter of appointment to the Interested Party on 12th September 2017 and that under section 30(6) of the Contempt of Court Act no state officer ought to be convicted of contempt of court for execution of his duties in good faith.

He deposes that the orders sought by the applicant if implemented would relieve the Interested Party of her job without being accorded a hearing or questioning the process through which she was appointed, contrary to the rules of natural justice. He deposes that the orders obtained by the Ex Parte Applicant did not include an order prohibiting the Interested Party from performing the duties of her office, and would violate her right to equal protection of the law. He further deposes that the Ex Parte applicant has not proved the grounds upon which such orders may be granted being irrationality, illegality and impropriety of procedure on the part of the KEFRI Board. He deposes that the Ex Parte Applicant has not demonstrated the prejudice he will suffer by the Interested Party remaining in office until the substantive application is heard and determined, or that he cannot be compensated by way of damages or costs. He deposes that the application is premature, incompetent and without merit and prays that the same be dismissed with costs.

Jane Wangu Njuguna, the Interested Party also filed a Replying Affidavit sworn on 17th November 2017 in which she deposes that she and the Ex Parte Applicant attended an interview for the position of Senior Deputy Director Research and Development in which she emerged as the best candidate in a fair and competitive process following which she was appointed to the position. She deposes that the Ex Parte Applicant was unhappy with her appointment because she is a woman and filed the substantive motion herein to overturn the appointment. She deposes that she was not personally served with the pleadings and order that she is alleged to have disobeyed which she received from the Respondent's registry where

service was effected on 11th October 2017. She was therefore surprised to see her personal official stamp, which she keeps under lock and key on the documents filed in court in support of the present application.

The Interested Party further deposes that the Ex Parte Applicant obtained her payslips irregularly and has used them in this application without her consent. She prays that the same be expunged from the record.

In a further affidavit filed in response to the replying affidavits of the Respondent and the Interested Party, the Ex Parte Applicant deposes that the Director of the Respondent and the Interested Party were properly served with court orders which they failed to obey. He further deposes that the irregular appointment of the Interested Party has frustrated him and has made him unable to perform his work as Deputy Director Research and Development as he reports to her.

The application was argued in court on 30th November 2017. The parties largely adopted and expounded on their pleadings.

Determination

I have carefully considered the application, the grounds and affidavits in support thereof and the replying affidavits. The issues for determination are whether the Respondent and the Interested Party are guilty of contempt of the court orders dated 10th October 2017 and whether they are liable to punishment for the same.

The orders alleged to have been disobeyed are that the leave granted to the Ex Parte applicant do operate as a stay of the decision of the Respondent in the appointment of the Interested Party to the position of Senior Deputy Director Research and Development, made on the 12th September 2017, pending the hearing and determination of the application. The application referred to is the chamber summons dated 6th October 2017. The said application was heard and determined on the same day in chambers in the absence of the parties.

I have two problems with the application dated 6th October 2017. The first is that the applicant sought stay pending the hearing of the application. The application was considered and finally determined when the applicant was granted prayers 1 to 4 of the application. Technically therefore no temporary orders could be granted pending the hearing and determination of that application because it was heard and concluded upon its presentation to the judge when he granted all orders sought, with the exception of prayer 5 which is for costs.

My second problem is that the prayers sought were to stay a decision that had already been implemented. The orders sought were to stay a decision made on 12th September 2017 appointing the Interested Party to the position of Senior Deputy Director Research and Development. The decision having already been implemented, there was nothing to stay. The prayers by the Applicant did not require the applicant to leave office. The prayers did not require the Respondent to withdraw the appointment of the Interested Party. The true position is that the decision to appoint was made on 8th September 2017 and implemented on 12th September 2017 when a letter of appointment was issued to the Interested Party.

There was therefore no decision made on 12th September 2017 that was capable of being disobeyed the application having been made *ex post facto*.

Even assuming that there was a decision made on 12th September 2017 that was to be stayed, what did the Respondent and the Interested Party do that would constitute contempt?

My understanding of the orders granted on 6th October 2017 is that the decision should not be implemented. Since the decision had already been implemented and the Respondent and Interested Party did not do anything in furtherance of the decision after the date of the order, they did not commit any act of contempt. All they did was to maintain status quo as at the date of the court order and in my

understanding that does not constitute disobedience of a court order. There was no court order of mandamus requiring the Respondent to withdraw the letter of appointment as such was not prayed for in the Ex Parte Applicant's application. There was also no order of prohibition against the Interested Party from carrying out the duties of her office. A stay pending hearing cannot be construed to mean more than the words thereof state.

Having reached the conclusion that there was no contempt, I do not have to determine the other issues raised by the Respondent and Interested Party about the procedure of contempt proceedings against state organs. On the Interested Party's application concerning the irregular acquisition of documents by the Ex Parte applicant, it is my considered view that it should be made through a formal application and the ex parte applicant given an opportunity to respond. It cannot be made through a replying affidavit or in submissions as has been done.

Conclusion

In conclusion, I find that the Ex Parte Applicant's application dated 9th November 2017 has not been proved with the result that the same is dismissed. The costs of the application shall be in the cause.

DATED, DELIVERED AND SIGNED THIS 16TH FEBRUARY 2018

MAUREEN ONYANGO

JUDGE