

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 29 OF 2014

BANKING INSURANCE & FINANCE

UNION (KENYA) CLAIMANT

VERSUS

NAWIRI SACCO SOCIETY LIMITED RESPONDENT

RULING

1. The application before me is the Claimant/Applicant's notice of motion application dated and filed on 5th December 2017. It is expressed to be under Section 22 of the Employment Act No. 11 of 2007, Sections 5, 29 and 33 of the Labour Relations Act Cap. 234 B of the Laws of Kenya, the Employment & Labour Relations Court (Procedure) Rules 2016 and all other enabling provisions of the law. The Claimant/Applicant seeks to have in the main **the order for a proper and meaningful deployment of the grievant Pius Mutugi Kariuki as a Savings Clerk in the Respondent's employment in line with order 5 of the Court's judgment dated 14th November 2014 which read *inter alia* :- that the grievant Pius Mutugi to report to the Respondent's chief executive officer on Monday 17.11.2014 for deployment as a savings clerk and the grievant to remain in employment unless otherwise lawfully terminated.**

The application is supported by the affidavit of Isaiah Munoru Mucheke the research economist of the Claimant/Applicant. In the grounds on the face of the motion it is stated that the grievant was never deployed by the Respondent as a savings clerk as ordered by the Court under the pretext that the position had been filled by another employee. The Claimant/Applicant is of the view that the deployment at the EMCO house was akin to a security job and was meant to demoralize the grievant. The Claimant/Applicant asserts that the Respondent issued very unfamiliar instructions for the grievant to report to Mount Kenya Nuts and Agricultural Commodities factory as a gate keeper and it was the position of the Claimant/Applicant that the Respondent had even hired other employees carrying out the roles of clerks yet the grievant was not posted to be a gate keeper. The affidavit by the Claimant/Applicant's research economist is in similar vein and depones that the Respondent did not fully implement the court order which was bad labour practice and that goes against the rule of law and the court's judgment.

2. The Respondent was opposed and filed a replying affidavit sworn by Rose Waithaka the human resources manager of the Respondent she averred that the grievant had been terminated on suspicion of theft of monies belonging to the Respondent's members and having lost confidence in him, the Respondent terminated his employment. The Claimant was however reinstated by the court in full compliance of the court order, the Respondent's CEO wrote a letter to the grievant informing him that he would be reinstated with effect from 17th November 2014. However, the grievant's previous position was no longer available to him because the Respondent had reported another employee to replace the grievant. In that regard, the grievant was re-engaged and deployed as a clerk at the main entrance of the Respondent's headquarters EMCO house which also housed one of the Respondent's bank branches. The Respondent asserts that it is merely exercising its prerogative of determining which workplace to keep grievant by seconding him to work in one of its properties. The Respondent avers it complied with the court order but given the strained employment relationship, strict compliance with the court order is increasingly proving untenable hence the decision to deploy him to workplace other than EMCO house which is owned by the Respondent. She further deponed the Respondent could not comply with the court order of 23rd January 2010 because is no position available to the grievant as a savings clerk, which information is well within the claimant's knowledge. She stated further that by accepting the job description by the deployment letter of 27th January 2015 the claimant is stopped by contact from challenging the grievant's job description by the deployment letter of 14th August 2017 because the job descriptions are similar.

3. In the application before me, the Grievant was successful in his case against the Respondent in as far as the court ordered his reinstatement to employment. He was deployed at the Respondent's EMCO house at first and subsequently deployed man a gate at a different location precipitating this application.

4. It is clear from the record before me that this suit was decided in 2014 and the issues that are raised for determination occurred in 2016. That in my view precludes this court for making any determination on the matters raised in the notice of motion as the court became *functus officio* upon the pronouncement of the judgment that was never reviewed nor appealed against. What is sought in the motion before me is neither a review of the court's decision nor is this a notice to show cause or reference after the taxation of the cause. In *obiter*, the Claimant ought to have initiated the discussion of the issues arising under the terms of the CBA in place when they occurred and thereafter if dissatisfied seek redress from court. The application is thus hopeless in substance as the court is *functus* and I accordingly dismiss the notice of motion by the Claimant but I make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 14th day of March 2018

Nzioki wa Makau

JUDGE