



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1993 OF 2017

MABEL KIBORE

CLAIMANT

V

NATIONAL OIL CORPORATION OF KENYA RESPONDENT

RULING NO. 2

1. For determination is an application dated 18 December 2017 by the Claimant seeking

1. ...

2. THAT, this Honourable Court be pleased to grant leave to the Applicant to cite Mary Jane Mwangi, the Chief Executive Officer of the Respondent herein for contempt of Court.

3. THAT, this Honourable Court be pleased to issue a 30 days' notice to the said Mary Jane Mwangi to show cause why contempt of court proceedings should not be commenced against her, being the Accounting Officer of the Respondent for her refusal, failure, neglecting and/or ignoring to comply and or obey the order of the Court (Hon. Nzioki wa Makau, J) issued on 8 November 2017, and particularly her refusal to pay the Applicant's salary and allowances for the months of August, September, October, November and December 2017.

4. THAT, the said Mary Jane Mwangi be made to personally bear the costs of this application.

2. When the application was placed before Court on 19 December 2017, the Court directed that it be served for *inter partes* hearing on 23 January 2018.

3. On 23 January 2018, the Respondent successfully sought for time to file a response to the application, and the Court directed it to file and serve a response on or before 26 January 2018. *Inter partes* hearing was scheduled for 31 January 2018.

4. Apart from filing a replying affidavit in opposition to the application, the Respondent filed its own application seeking

1. ...

2. THAT this Honourable Court be pleased to issue a clarification on the orders issued on herein 8th November, 2017 on the Claimant's Notice of Motion dated 5th October, 2017 on whether the Respondent should pay the arrears between the months of August to November (both months inclusive) being the period between termination and reinstatement.

5. When the parties appeared before Court on 31 January 2018, the Court directed that the Respondent's application seeking clarification be treated as a response to the Claimant's application seeking issuance of notice.
6. Despite giving the directive on manner of dealing with the applications in writing, the Claimant expressed her disaffection with the directive in the course of arguments.
7. However, having given the directive and considering that the directive is appealable at the instance of the disaffected party, the Court will treat the Respondent's application as grounds of opposition to the Claimant's application.
8. However, some background would be in order.
9. On 8 November 2017, Nzioki wa Makau J issued the following orders

IT IS HEREBY ORDERED

1. **THAT** the Claimant/Applicant succeeds on the limb seeking reinstatement to the position of Head of Human Resource & Administration and for the avoidance of any doubt the advertisement to fill her position be and is hereby cancelled and the process of recruitment halted as she is in post.
 2. **THAT** the prayers for halting of disciplinary process are overtaken by events and thus collapse.
 3. **THAT** costs of this application to the Claimant.
10. The Respondent filed a *Notice of Appeal* against the said ruling/orders on the same day.
 11. On 9 November 2017, on an application by the Respondent, Onyango PJ issued an order temporarily staying the orders issued by Nzioki wa Makau J the previous day pending *inter partes* hearing on 23 November 2017.
 12. However, the hearing of the stay application could not proceed on 23 November 2017, and it was rescheduled to 30 November 2017.
 13. After hearing the parties, ruling was reserved to 5 December 2017, when the Respondent's application for stay pending appeal was dismissed.

Current applications

14. The dismissal of the *stay of execution pending appeal* application prompted the Claimant to move Court seeking the orders outlined earlier on in this ruling.
15. In seeking the issuance of a notice to commence contempt proceedings, the Claimant contended that despite the orders of Court issued on 8 November 2017 having been served, the Respondent had failed to pay her August to December 2017 salaries, and the Respondent had blocked her from accessing her office.
16. Outlining oral submissions to support the application, the Claimant urged that there was material to show that the Respondent had not complied with the court order of 8 November 2017, as salaries for August to November 2017 had not been paid and that the Respondent had admitted as much in its application seeking clarification.
17. It was also urged that the Respondent had the opportunity to comply with the court order but had failed and was instead *bullying* the Claimant.
18. For the Respondent, it was asserted that the Claimant had been swiftly reinstated and was working

and had been paid remuneration for December 2017, and that the order of reinstatement was not retrospective and in any case the court order did not direct/was not clear on the payment of past salaries.

19. Further, the Respondent submitted that it was acting in good faith.

20. The Court has considered the grounds advanced by the parties and the oral submissions.

21. Without attempting to discuss the merits of the orders of 8 November 2017 and their legal propriety at the stage the proceedings had reached, it is not in dispute that there is on record an order reinstating the Claimant back to her position, but without expressly rendering itself on the question of salary during the intervening period.

22. The substantive law in this jurisdiction on reinstatement is section 49(3)(a) of the Employment Act, 2007 and it provides Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to –

(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or

23. By dint of section 50 of the Act, the Court is also enjoined to be consider the provisions of section 49 of the Act.

24. From a textual interpretation of the aforecited provision of the Act, reinstatement implies that the employment relationship is considered as having not been determined and therefore, unless the Court orders otherwise, *back pay* accrues to the reinstated employee.

25. With the clarification and considering that the Respondent had expressed an intention to comply, it is well advised to pay the Claimant the salaries for August to December 2017 unless the Court of Appeal stays the orders of 8 November 2017.

26. With the clarification, it would not be necessary or legally prudent for the Court to issue the 30 days' notice sought, on the circumstances presented on the record.

27. The application dated 18 December 2017 is thus declined with an order that each party bears own costs.

Delivered, dated and signed in Nairobi on this 2nd day of March 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mwaura instructed by Karuru Mwaura & Co. Advocates

For Respondent Mr. Ouma instructed by Robson Harris & Co. Advocates

Court Assistant Lindsey