



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 15 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 25th June 2018)

FELISINA WANJIRA NDWIGA.....APPLICANT

VERSUS

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL...2ND RESPONDENT

RULING

1. The Application before me is the Notice of Motion Application dated 26.2.2018 filed under Certificate of Urgency on the grounds that by a judgment delivered on 21.9.2017, this Court ordered *inter alia* that the Applicant be re-engaged in the Public Service and preferably in a different Ministry but on the same rank and that she be paid all her salaries and allowances earned from the time of her illegal dismissal and that she be retained in the service until her retirement age unless she commits another offence warranting dismissal in which case she would be subjected to a proper, fair and legal disciplinary process.

2. She avers that the Respondents have since deliberately disobeyed this order and failed to comply with it.

3. She avers that there is no Appeal filed by Respondent save a Notice of Appeal filed in Court on 5/10/2017 which was served out of time and Civil Application No. 297/2017 has been filed seeking to strike it out.

4. The Application is filed through a Notice of Motion filed under Section 5(1) of Judicature Act, Cap 8 (now repealed by Contempt of Court Act No. 46 of 2016, Section 38) and Section 1A and 1B, 3 and 3A of the Civil Procedure Act, Cap 21 and all enabling provisions of the law.

5. The Applicant seeks orders:

1. That this Application be certified as urgent and the service of the same be dispensed with in the first instance and the same be heard on priority basis.

2. That this Honourable Court be pleased to commit to civil jail Alice Otwala, the Secretary of the Public Service Commission for a period of six (6) months for disobeying the Court orders given on 21/9/2017 by Honourable Lady Justice Hellen Wasilwa.

3. That this Honourable Court be pleased to commit to civil jail Alice Otwala, the Secretary of the Public Service Commission to purge the disobedience and to immediately comply with the orders of this Honourable Court given on 21/9/2017 by posting the Applicant to any Ministry immediately as ordered by this Honourable Court in September, 2017.

4. That this Honourable Court be pleased to grant such directions and other or further orders as it may deem fit to grant geared towards protecting the dignity and authority of this Honourable Court.

5. That the cost of this Application be provided for.

6. The Application is grounded on the following grounds:-

a) That the orders given on 21/9/2017 were to be implemented by the Secretary of the 1st Respondent herein.

b) That at all material time the Respondents were represented by Legal Counsel who are aware of the Court Judgement and were further served with the Court decree and a copy of the Judgement through a Process Server by the Applicant for compliance.

c) That the Respondents on 21/9/2017 have never communicated to the Applicant regarding her posting despite follow up made by the Applicant.

d) That no appeal lies to the Court of Appeal as no valid Notice of Appeal has been filed.

e) That the Notice of Appeal filed on 5/10/2017 is a subject of the Court of Appeal Civil Application No. 297 of 2017 which seeks to strike out the Respondents Notice of Appeal and therefore Respondents could not hang on it and allege that they have an appeal against the orders made on 21/9/2017.

f) That the statutory period to file appeal against the Court orders of 21/9/2017 have lapsed and in the absence of a valid Notice of Appeal no appeal lies before the Court of Appeal.

g) That non-compliance of the Court orders by the 1st Respondent's Secretary is a clear indication that the Respondents have no intentions of complying with the orders of this Honourable Court.

h) That this amounts to contempt on the face of the Court and is therefore punishable summarily.

7. The Application is also supported by the Supporting Affidavit of the Applicant herein who has deponed on issues stated in the grounds herein. She avers that the Respondent filed a Notice of Appeal on 5/10/2017, 56 days and there is no appeal before the Court of Appeal.

8. She avers that the Respondents were served with the judgement and a decree on 5/10/2017 and also posted the same via an email to 1st Respondent's website and copied to each Commissioner of 1st Respondent and so the Respondents are fully aware of the Court orders and have intentionally ignored to honour them.

9. The Applicant avers that the Respondents are in contempt of the orders of this Court and should be punished.

10. The Applicant annexed the affidavit of service of the Court decree and judgement deponed to on 5/10/2017 and filed.

11. The Respondent on their part filed an Application for stay of execution on 22.2.2013. They contend that unless the Application for stay is granted they will suffer harm. They aver that the appeal has chances of success.

12. They aver that their appeal stands a good chance and will be rendered nugatory since the Applicant will not be in a position to refund any moneys due to them if the appeal succeeds.

13. The Respondents replied to the Contempt Motion arguing that they have not complied with the Court order since they have filed an appeal which stand to succeed. They also seek stay so that the appeal would not be rendered nugatory.

14. The Parties also filed their respective submissions.

15. 1st on the contempt Application, the Respondents have not denied knowledge of the Court's judgement and decree. They aver that their hands are tied with the intended appeal they have filed.

16. They aver that the delay in filing the appeal is due to missing records beyond the scope of the Respondents.

17. I have examined the averments of both parties. There is proof and even admission by the Respondents that they are aware of the Court orders and judgment granted in this Cause by Court on 21.9.2017 which was served upon them. They even admit understanding the import of the said judgment but state that they are unable to comply by virtue of an intended appeal they seek to file which appeal has not been filed to date by virtue of some delay.

18. My understanding of the Respondent's submissions is that they are fully aware of the Court's judgement but are not able to implement it because they are aggrieved with the same judgement.

19. The Respondents cited Section 38(2) of the contempt of Court Act No. 46 of 2016 which provides that "no contempt of Court proceedings shall be commenced against the accounting officer of a state organ, government department, ministry or corporation unless the Court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of Court proceedings should be commenced against the accounting officer".

20. They submitted that the Applicant failed to follow this procedure and no notice was issued by this Court allowing the Applicant to commence contempt of Court proceedings against the Respondents.

21. I do agree with the provision of Section 38(2) of the Contempt of Court Act as stated above. There is no indication that the 3rd Respondent was issued with a notice to show cause why contempt proceedings should be commenced against her before the proceedings were commenced. In this regard, the Applicant came to Court early. Since the Applicant omitted this provision couched in mandatory terms, the Application is improperly before Court and I strike it out.

22. On stay orders sought, I do not find any merit in them as no appeal has been filed since judgment was delivered in September 2017. I therefore dismiss both Applications and order execution to issue.

Read in open Court this 25th day of June, 2018

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Applicant - Present

Respondents – Absent