



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1082 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

TERRY MAINA.....CLAIMANT/APPLICANT

VERSUS

EAST AFRICAN PORTLAND

CEMENT COMPANY LIMITED.....RESPONDENT

RULING

Before me for determination is a notice of motion filed under certificate of urgency on 23rd May 2017 seeking the following orders –

1. That for reasons to be recorded this matter be certified as urgent and be heard ex parte in the first instance on account of its urgency.
2. That the Court do find the Respondent, through its Managing Director MR. SIMON PETER OLE NKERI guilty of Contempt of Court for failure/refusal to comply with the Judgment and Decree of this Honourable Court dated 18th November 2016 and 23rd November 2016 respectively.
3. That this Honourable Court do commit the Respondent's Managing Director MR. SIMON PETER OLE NKERI to Civil Jail for a period not exceeding six months for contempt of court.
4. That the costs of this Application be borne by the Respondent.

The application is made under Section 4(c), 5, 28 and 29 of the Contempt of Court Act, 2016 and all enabling provisions of the law. It is supported by the affidavit of TERRY MAINA, the applicant and on the grounds on the face of the application.

In sum the applicant's reason for filing the application is that this court delivered its judgment herein on 18th November 2016 and a decree dated 23rd November 2016 was extracted requiring the respondent to provide the claimant with the necessary clearance documents to access her pension in the sum of Kshs.680,590 together with accrued interest.

The claimant avers that the respondent Chief Executive Officer has failed and/or refused to comply with the court orders. The applicant states that the respondent complied with some of the orders in the decree but failed to comply with the orders above, that the respondent was represented by counsel and is aware about its obligations and further that the applicant has sent several reminders through her advocates which have not elicited compliance by the respondent.

The applicant states that MR. SIMON PETER OLE NKERI being the Managing Director of the respondent is responsible for the overall performance of the respondent's obligations including compliance with court orders and his failure or refusal to abide by the decree herein amounts to contempt and is punishable by the court under its jurisdiction on contempt of court.

The respondent filed a replying affidavit of ROSELYNE OMINDE a legal officer of the respondent who deposes that the respondent has duly responded to the applicant's demands for clearance documents and has informed the applicant that she can access the pension funds directly from the pension scheme, that the pension scheme is a separate entity from the respondent, governed by its own rules and is not under the control of the respondent.

Ms. Ominde deposes that the applicant has not shown what steps she has taken to further her demands directly to the pension scheme as advised by the respondent through its advocates or indicated the challenges faced pursuant to such requests made to the pension fund. Ms Ominde further deposes that the administrator for its staff pension scheme is not Alexander Forbes but AON MINET. She referred to a copy of the Rules of the East African Portland Cement Company Limited Staff Retirement Benefits Scheme Trust Deed and Rules attached to her affidavit as Exhibit "RO-2."

It is further deposed by Ms. Ominde that according to the Trust Deed and Rules the applicant who was employed on 19th April 2001 and terminated on 31st July 2003 is not eligible for any benefits under the Trust Deed and Rules as she had not served for the mandatory minimum period of three years, the scheme having been a defined benefits scheme under which only the employer made contributions. It is further deposed that the applicant has not stated what documents she requires from the respondent to enable her access her pension, that the application is an abuse of court process and is intended to embarrass the respondent and further that she has not proved that the respondent has committed any act that may be construed as contempt.

Submissions

The applicant filed submissions but the respondent did not.

In the submissions the applicant reiterates the averments in the application. She relies on the case of **SHIMMERS PLAZA LIMITED -V- NATIONAL BANK OF KENYA LIMITED [2015] eKLR** in which the court held that it is not mandatory to serve an order together with a penal notice and that knowledge of a court order is sufficient to dispense with personal service. The applicant further relied on the case of **BASIL CRITICOS -V- ATTORNEY GENERAL & 8 OTHERS [2012] eKLR** in which the court held that knowledge supersedes service.

The applicant further relied on the case of **ECONET WIRELESS KENYA LIMITED -V- MINISTER FOR INFORMATION AND COMMUNICATOR OF KENYA & ANOTHER** in which the court held that it is essential for maintenance of the rule of law and order that the authority and dignity of our courts are upheld at all times and that a party must obey orders by a court of competent jurisdiction unless and until that order is discharged.

Determination

It is not in dispute that on 18th November 2016 this court delivered judgment in favour of the claimant/applicant herein in which it ordered as follows –

“In the final analysis, the court awards to the plaintiff as against the defendant;

a) Arrear salary of four (3) months Kshs.544,590;

b) Arrear rental three (3) months Kshs.105,000;

c) School fees benefits Kshs.589,000;

d) In lieu of notice Kshs.544,590;

e) In lieu of leave Kshs.181,530;

f) Ten (10) months compensation Kshs.1,815,300;

Total award Kshs.3,598,400;

g) The award in (a) (b) (c) (d) & (e) is payable with interest at court rates from the date of termination till payment in full.

h) The award in (g) is payable with interest at court rates from date of filing suit till payment in full.

i) The respondent is directed to provide the plaintiff with necessary clearance documents to access her pension in the sum of Kshs.680,590 plus accrued interest since date of termination from defendant's pension provider at the time, Alexander Forbes.

j) Costs to follow the outcome.”

A decree was later extracted and issued on 23rd November 2016 for the total sum of kshs.8,720,693 which is confirmed in correspondence in the affidavit of the applicant was paid by the respondent. The only issue outstanding is therefore the facilitation of the applicant to access pension as specified in the judgment.

From the correspondence between the parties, it is apparent that by letter dated 24th February 2012 the respondent informed the applicant that she could access her pension directly from the scheme in accordance with the Scheme Rules. The respondent clarified in the said letter that it was only a sponsor and would intervene only if there was a specific matter affecting the progress of access to the pension dues.

The applicant has not shown that she has applied to be paid her pension directly to the Scheme Manager and has failed. She has further not demonstrated the exact facilitation or documentation she requires from the respondent to enable her access her pension or that she has been unable to access her pension due to the failure of the respondent to facilitate any documentation necessary for her to access the pension.

Section 4 of the Contempt of Court Act provides as follows –

4. Contempt of Court

(1) Contempt of court includes —

(a) civil contempt which means wilful disobedience of any judgment, decree, direction, order, or other process of a court or wilful breach of an undertaking given to a court;

(b) criminal contempt which means the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which —

(i) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice.

(2) In any case not relating to civil or criminal proceedings as contemplated under subsection (1), an act that is wilfully committed to interfere, obstruct or interrupt the due process of the administration of justice in relation to any court, or to lower the authority of a court, or to scandalize a judge, judicial officer in relation to any proceedings before the court, on any other manner constitutes contempt of court.

In this case it has not been proved by the applicant that the respondent committed any act or failed to comply with any specific order of the court. The court order is clear that all the respondent was required to do was “*to provide the claimant with necessary clearance documents to access her pension...*”

The respondent having informed the applicant that no documents were necessary from the respondent to access her pension, she has not proved that she tried to access her pension directly from the scheme and failed due to the respondent’s failure to provide any documentation. I may here add that indeed it was not necessary for the applicant to obtain a court order to access her pension as the Retirement Benefits Act and Rules made thereunder are elaborate on all matter relating to Pension and resolution of disputes thereunder. A sponsor has no role in the payment of pension to a member of the scheme as this is the role of the Scheme Manager and Trustees.

The result is that I find no evidence of contempt by the respondent or its

Managing Director Mr. SIMON PETER OLE NKERI. This being the case the application herein is dismissed with costs.

DATED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE