



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 159 OF 2016

(Before D. K. N. Marete)

ANTHONY KIPNGETICH KORIR.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT, IMARISHA SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED1ST RESPONDENT

CHIEF EXECUTIVE OFFICER, IMARISHA SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED.....2ND RESPONDENT

RULING

This is an application by way of Notice of Motion dated 29th March, 2018 and seeks orders as follows;

1. *This application be certified urgent and service be dispensed off in the first instance.*
2. *THAT this Honourable Court at the first instance be pleased to summon, Mathew Ruto, David Langat, Charles Sigey, Koech Kiplangat, Shady Sigey, Peter Nyigei, Andrew Mutai, Judy Kirui, Jessica Siele, Philip Siele, Rodrick Chepkwony and Mathew Rotich to show cause why they should be cited for contempt for disobeying this Honourable court's orders.*
3. *THAT pending the hearing and determination of the application herein this Honourable Court be pleased to order the Respondents herein to reinstate the Claimant as the Senior Internal Auditor of Imarisha Savings and Credit Co-operative Society Limited in line with the consent judgement of 9/12/2016.*
4. *THAT pending the hearing and determination of the application herein this Honorable court be pleased to order the Respondents to strictly adhere to the terms of consent judgement of the 9th December, 2016 by ordering the Respondents to;*
 - a) *Pay the Claimant the outstanding arrears of Kshs.492,142.00*
 - b) *Pay the Claimant the outstanding gratuity of Kshs.16,204.53*
 - c) *Pay the Claimant his due gross salary of Kshs.437,386*
5. *THAT this Honourable Court be pleased to order the Respondents namely Mathew Ruto, David Langat, Charles Sigey, Koech Kiplangat, Shady Sigey, Peter Nyigei, Andrew Mutai, Judy Kirui, Jessica Siele, Philip Siele, Rodrick Chepkwony and Mathew Rotich to be committed to civil jail for a period of up to six months for disobedience of the Honourable Court Orders.*
6. *THAT the Respondents do bear the Costs of this Application.*

This is variously grounded on facts set out on the face of the application and which shall clearly come out in the course of this ruling.

The respondents in a Replying Affidavit sworn on 10th May, 2018 oppose the application.

The applicant chooses to respond to the respondents Replying Affidavit in a Further Affidavit sworn on 31st May, 2018. This forces the respondents to do a reply in a Further Affidavit sworn on 20th June, 2018

The applicant in the Supporting Affidavit sworn on 28th March, 2018 avers that the 1st and 2nd respondents called him to a meeting where he was accused of leaking information to the Commissioner of Co-operatives and members of the Sacco about a payment of Kshs.3,000,000.00 to Daniel Mutai who was a former director which payment was not approved through an annual general meeting.

Other accusations were on a misappropriation of Kshs.11,000,000.00, a director retirement package of Kshs.14,800,000.00 paid to CIC Insurance and also disclosing information to an external auditor about payment of honoraria to the county cooperative officers Mr. Otti, Mr. Moraya and Mr. Oloo.

It is the applicant's further averment that the 1st and 2nd respondents were bitter as investigations were launched into their conduct by the Commissioner of Co-operatives and the Kenya Revenue Authority. As a consequence of this, the applicant was on 15th July, 2016 demoted and transferred to Mulot as Branch Secretary. This prompted the present suit.

The applicant's other averment is that on 5th December, 2016, the parties here in entered into a consent which consent was adopted as an order of court on 9th instant. This provided *inter alia* as follows;

- a) THAT the Respondents shall reinstate the claimant to the position of a Senior Internal Auditor based at Kericho Headquarters without any loss of benefits or change in the Job Description.
- b) THAT the Respondents shall pay the Claimant, his Responsibility allowance at the rate of 20% from August 2016 to date.
- c) THAT the Respondents shall not harass, intimidate, victimize, suspend or terminate the services of the Claimant on account of this suit or make reference to this suit in renewal of the Claimant's future employment contracts.
- d) THAT the Claimant hereby retracts any allegations of impropriety against the Respondents contained in his claim herein.
- e) THAT the Respondents to pay the costs of this suit
- f) THAT the matter be marked as settled.

The claimant/applicant further avers that pursuant to the consent order the 2nd respondent issued the applicant with a letter of reinstatement to the position of Senior Internal Auditor. The applicant later came to learn that this position had been offered to Mr. Leonard Ruto, his junior and former supervisee. He then wrote a letter to the 2nd respondent seeking clarification of duties and insisting on no change on the same.

Further, on receipt of the applicants January, salary, he discovered that he had not received any increment as per the negotiated Collective Bargaining Agreement and thereby wrote a letter of complaint to the 2nd respondent. He did another letter on 8th March, 2018 requesting for a meeting to discuss issues of the promotion of Leonard Ruto to his position and also lack of an accurate salary increment.

The applicant further avers that in accordance with the subsisting Collective Bargaining Agreement (2017 – 2020) he was entitled to a basic salary increment of 6%, house allowance at 55% of basic salary, responsibility allowance at 20% as consented to *inter partes* and a medical allowance of 15% of basic salary. In all, he had underpayments in outstanding arrears despite this having been correctly paid to the other employees. His basic salary was increased by Kshs.760 instead of Kshs.10,830.00. This also affected his payment and gratuity by Kshs.16,204.53.

The applicant's other averment is that on 9th October, 2017, he wrote to the 2nd respondent highlighting the issues he had raised but instead he received a letter deploying him to the position of Risk and Compliance Manager, a position that did not exist in the establishment. He was thereafter invited to a meeting between Mathew Rotich, CEO, Kiplagat Koech, secretary, Sigei Charles, treasurer and David Langat, vice chairman but the issues raised were not addressed.

It is his penultimate case that the respondents have continued to frustrate, victimize and harass him and further that the conduct of the board members is an affront to the administration of justice in Kenya and further undermines the dignity and integrity of the rule of law.

The respondents in their Replying Affidavit sworn on 10th May, 2018, from the onset intimate raising a preliminary objection to this application on a point of law as follows;

- (i) The Application herein is premised on a matter that has been concluded and is therefore *res judicata*;
- (ii) The matter herein is an omnibus Application that raises several issues, others of which have been dispensed with and are laches and/or have been overtaken by events;
- (iii) The Application is frivolous, vexatious and amount to abuse of this court's due processes;
- (iv) The Application is unmeritorious and bad in law.
- (v) The Applicant interpretation of the court order is mischievous, untenable.

(vi) Application is premised on misplaced assertion that the employment of the Applicant is permanent.

(vii) The Consent judgement lapsed upon the expiry of the contract (31st August 2016) and does not apply to the contract that started from 1st September 2016.

(viii) Averments in the Affidavit are clearly false and tantamount to perjury.

They do not however fruite this threat.

Further, the respondents aver that the supporting affidavit of the claimant/applicant comprises of falsehoods and half truths, is misleading and a misrepresentation of information with an attempt to misleading this court and should therefore be dismissed with costs. They deny contempt of the consent judgment of court in that the claimant/applicant was issued with a letter of reinstatement on 6th December, 2016 even before the consent judgment was adopted as an order of court.

The respondents' other averment is that since the position of Senior Internal Auditor had been assigned to another person, and bearing in mind that the respondents organizational structure was silent on the member of senior internal auditor appointable, both persons were maintained in the same position and therefore the futility of the applicant's complaints against the appointment of Mr. Leonard Ruto. This would be tantamount to denying promotion to deserving members of staff. The respondent had joined the society as a teller and rose to his current position. See.

It is the respondents' other case that the various issues raised in the applicant's letters of complaint, including that of his salary increase were addressed in various meetings *inter partes*. These remain resolved.

Again, the respondents' aver that a new organizational structure was signed on 18th September, 2017 with information to all affected employees. In this, the position of Risk and Compliance Manager was created and awarded to the claimant/applicant which he accepted.

The respondent's in the penultimate aver that several meetings have held to resolve the issues raised by the applicant and accommodate him at the work place but he has remained hostile and does not perform any duties when called upon so to do. His contract for service expired on 31st August, 2016 and on application for renewal, this was done. This is a demonstration of *bona fides* on the part of the respondent. They had no intention of unlawfully terminating the claimant from employment.

The respondent's further fault the production and annexure of the support document in the claimant's supporting affidavit on grounds that this can only be produced by either their makers or persons with their custody. Again, the consent order did not in any way debar the respondents from future changes in their organizational structure. The applicant hereby wrongly attempts to secure a permanent position in the organization and also seeks to bar others from being promoted to the same position now personalized as a right to himself.

The claimant/applicant in his Further Affidavit sworn on 31st May, 2018 pushes the fight a notch higher. It is his averment that this application is one of contempt of court borne out of a consent judgement of this court. Further, clause 8 (c) of the Collective Bargaining Agreement provides for the mode of promotion to vacant positions and in the circumstances, such promotion was not applicable to the position of Senior Internal Auditor held by himself. He also posits that he was wrongly denied his 6% salary increment.

The applicant further avers that the new organization structure and the creation for the position of Risk and Compliance Manager is irregular in that it is not provided for in the CBA. It is an afterthought occasioned by his quest for his former office.

The claimant/applicant raises issues of continued harassment and intimidation by the respondents, including a show cause letter received on 21st May, 2018 and raising a plethora of issues which was to be answered by 1400 hours on the same day.

Again, on 22nd May, 2018 and during the pendency of the contempt of court proceedings the applicant a show cause letter. This is all aimed at getting rid of the claimant.

The respondents in answer aver that the proceedings herein are clearly moot in that the claimant has been summarily dismissed from the employment of the 1st respondent. This renders the proceedings untenable in law and the claimant is now pursuing an academic exercise.

The respondents further justify their actions in this cause and in so doing deny contempt of court. They argue that the consent judgement was to expire with the expiry of the applicant's contract of service and no more.

The issues for determination in this application are;

1. Whether the claimant's application establishes the legal threshold for a case of contempt of court?
2. Whether a case of contempt of court ensues in the circumstances?

The 1st issue for determination is whether the claimant's application establishes the legal threshold for a case of contempt of court. The parties hold diametrically opposed position on this.

The claimant/applicant in his written submissions dated 9th July, 2018 pegs his case of contempt of court on the respondent's disobedience of court orders as follows;

(i) Harassment and intimidation of the claimant. This is based on the following;

- On 4th January, 2017 Mr. Leonard Ruto, the claimant's junior was promoted to the position of Senior Internal Auditor, the position held by the claimant. The claimant raised issues on this vide a letter dated 10th January, 2017.
- The claimant did not receive a salary as per the negotiated CBA for 2016. Again, he raised issues on this.
- The claimant on 8th March, 2017 requested for a meeting with the respondent on these two issues.
- The claimant was allocated new duties as Risk and Compliance Manager on 10th October, 2017. This position was not in the respondent's company structure and neither had he been adequately trained on this.

(ii) Victimization of the claimant.

- In July, 2017, the claimant received arrears of only Kshs.6,693.00 for the negotiated CBA 2017 – 2020. He was entitled to an increment at a rate of 6% of his basic wage which was Kshs.191,335.00 and not 180,505.00.
- He was entitled to a basic salary increment of 6%, house allowance at 55% of basic salary, responsibility allowance of 20% and medical allowance at 15% of basic salary.
- His basic salary was increased to Kshs.670.00 instead of 10,830.00 thereby affecting his other allowances to a total and a payment amounting to Kshs.492,142.00.
- He disputes that he had a bar/ceiling and avers that this is not provided for in the CBA.
- Page 20 of the CBA provides for annual increment at the beginning of every financial year.
- Salary increments are based on current salary and not minimum salary per job grade as provided by clause 8 (c) of the CBA.
- Responsibility allowance is 20% as awarded by this court.
- That the claimant was discriminated on as a punishment for instituting this suit against the respondent.

The respondent denies a case of disobedience of the consent court orders entered into on 9th December, 2016. It is her submission that she has fully complied with the court order by, from the onset reinstating the claimant to the position of Senior Internal Auditor as agreed and entered into by the consent of the parties.

The respondent further submits that the bone of contention in the circumstances and the claimant's issue is one of the promotion of Leonard Ruto, an employee of the respondent to the position of Senior Internal Auditor, a position he considers as being his. This is as follows;

5. In the claimant's own words he was reinstated to this position (see Further Affidavit sworn by Anthony Kipnetich Korir sworn on 31st May, 2018), particularly Annexure "AK 1" page 6. The Claimant's major complaint is that he was made to serve in this position with a person he consider his junior, one Leonard Ruto.

It is her further submission that the consent order entered into did not debar the respondent from appointing any other persons to the position of senior internal auditor and therefore the appointment of Leonard Ruto. The applicant should have been content with the new appointment as this reduced his duties and this, on the same pay.

The respondent further submits that the claimant was paid salaries and allowances as per the subsisting CBA and the salary guidelines of the organization. On this issue, an *ad hoc* committee deliberated on the complaints raised by the applicant and came up with the following finding and conclusion;

'...Mr Korir was given salary increment as per the CBA 2015/2016, where he had reached the bar. He was given salary increment upto his bar.....'

It is the respondent's further submission that the standard of proof of contempt proceedings must be higher than proof on a balance of probabilities and must not exactly, as beyond reasonable doubt. The claimant/applicant in the circumstances of this case has not met the standard of proof either way: The middle ground between balance of probability and beyond reasonable doubt. He has not adduced any evidence that indicate that the respondents have acted in contempt to this court's order.

The respondent's further submitted on the place of contempt of court proceedings and their relationship to the liberty of the person at stake, the contemnor. This therefore necessitates a higher standard of proof than in civil cases. This is expressed as follows;

"The Court take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A many may be sent to prison. It must be satisfactorily proceed... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable

doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt.....it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

A scrutiny of the respective cases of the parties tilts this application in favour of the respondent. This is primarily on the ground that the claimant/applicant does not come out with a case warranting a finding of contempt of court. I agree with the respondent's case that the claimant has not adduced any concrete evidence establishing a case of contempt of court in the circumstances.

Further, the respondent denies contempt of court and submits that all the issues raised by the claimant/applicant were addressed and resolved by herself. The applicant is therefore being dishonest on his presentation of his case and unduly blowing hot to sustain the same.

The applicant's case sounds like one of squaring issues based on personal vendetta. The respondents observed and submit as such. This is as follows;

6.The Respondents have clearly stated that there was nothing in the organizational structure forbidding them from having two Senior Internal Auditors. The consent entered in court did not provide that there should only be one Senior Auditor in the organization. The Applicant herein clearly brought this action as a way of seeking to have this court message his ego. Like other employees, Leonard Ruto was entitled to earn promotion. The fact that he had been trained by the Applicant did not make him undeserving for promotion. It was for the Respondents to use their sole discretion in determining how many employees that should serve in any particular position.

The parties make presentations and submissions on the current (subsisting state of affairs in this cause: the termination of the employment of the claimant. I must, however, add that this is the subject matter for another day.

I am therefore inclined to dismiss that application with orders that each party bears their own costs of the application.

Delivered, dated and signed this 23rd day of July, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mrs Wachira instructed by Wachira Wekhomba AIM Associates Advocates for the claimant/applicant.
2. Mr. Bosek instructed by J.K. Bosek & Company Advocates for the respondents.