



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO. 410 OF 2018

(Formerly Mombasa ELRC No. 131 of 2018)

(Before Hon. Lady Justice Hellen S. Wasilwa on 16th July, 2018)

AHMED MOHAMMED DAGANE CLAIMANT

VERSUS

THE COUNTY SERVICE BOARD

GARISSA COUNTY RESPONDENT

RULING

1. There are two Applications before me. The first Application is the one dated 14.3.2018 and filed by the Claimant/Applicant on 14.3.2018 under Certificate of Urgency and filed through a Notice of Motion Application brought under Section 3, 4, and 12 of Employment and Labour Relations Court Act 2014, Rule 14, 16, and 27 of the Employment and Labour Relations Court (Procedure) Rules 2016, Section 17, 18, 19, 20, 21 and 25 of the Employment Act 2007, Article 41 of the Constitution of Kenya and all enabling provisions of the law.

2. The Applicant seeks orders that:-

1. "Service of this application be dispensed with it and be heard Ex-parte as the first instance.

2. This Honourable Court do issue orders restraining the Respondent from withholding and or deducting the Claimant's salary owing from November 2017 to March 2018 amounting to Ksh.2,728,063.00.

3. This Honourable Court do issue an order compelling and or directing the Respondent to pay the Claimant his salary arrears and or owing from 1st of November 2017 to March 2018 amounting to Ksh.2,728,063/= and to continue paying the Claimant his monthly salary to the tune of Kshs.473,689/= together with any salary increments with effect from January 2018 as and when they fall due on a month to month basis pending the hearing and determination of the application herein.

4. This Honourable Court do issue an order compelling and or directing the respondent to pay the claimant his salary arrears and or owing from 1st of November 2017 to March 2018 amounting to Ksh.2, 728,063/= and to continue paying the claimant his monthly salary to the tune of Kshs.473,689/= together with any salary increments with effect from January 2018 as and when they fall due on a month to month basis pending the hearing and determination of the claim herein.

5. This Honourable Court do issue a permanent and or mandatory injunction restraining the respondent from withholding and or deducting the claimant's salary owing to him which by 31/3/2018 was Ksh.2,728,063/=.

6. Costs be provided for."

3. The Application is supported by the annexed affidavit of the Applicant herein dated 14.3.2018 and on the following grounds:-

1. "The Claimant/Applicant was employed on 5/3/2015 as a Chief Executive Officer, Garissa County Referral Hospital for a contract of six (6) years, at gross pay of Kshs. 459,089/= per month inclusive of house allowance. This amount rose to a monthly pay of Kshs.473,689/= in July 2016.

2. He was transferred to the Department of County Affairs in the capacity of a Senior Director vide a letter dated 24/5/2017 and posted vide letter dated 29/5/2017. His terms of employment remained the same.

3. Between March 2016 and October 2017, part of his salary and/or benefits were withheld, without any consultation, agreement or notice or express consent, though attempts were made to pay him the same as arrears.

4. On 1/11/2017, his salary was stopped indefinitely without any consultation, agreement or notice or express consent. The amount in salary arrears as at March 2018 is Kshs.2,728,063/=.

5. After the General elections of 8/8/2017 the Applicant has found it very difficult to work with the new administration. On 2/1/2017, after the December holidays he was asked by Respondent's County Secretary to stay at home and not come to work until a decision on his contract issue was reached by the new Governor, Hon. Mr. Ali B. Korane who was handling the issue personally.

6. The Claimant has met the Governor twice on 8/1/2018 and again on 20/2/2018 and on the first occasion he was told that his issue would be discussed with the County Service Board Secretary and the Human Resource office but on the latter occasion the Governor told him that he had pushed the issue to the County Public Service Board.

7. The Claimant has made several visits and inquiries and has met with the Secretary and Head of County Public Service, the Governor, the Deputy Governor, and the Director Human Resources on the issue to no avail.

8. On the 9th February 2018, he wrote a letter to the Respondent and copied it to several officers including the Governor, the Deputy Governor, and the Director Human Resources but to date the said letter has not yet been replied to.

9. The claimant who is a family man and whose salary was his only source of livelihood continues to suffer financial constraints due to the stoppage of his salary and he will suffer irreparably if the said salary is not reinstated."

4. In his annexed affidavit, the Applicant deponed to facts as stated in his grounds above and annexed copies of his appointment letter, letter of transfer dated 24/5/2017 and copies of his payslips for 2016 and 2017.

5. He depones that he wrote a letter to the County Public Service Board and copied it to the Governor, Deputy Governor and the Director Human Resource on 9.2.2018 but to date he has received no response.

6. When the Applicant appeared before the Court ex-parte on 14/3/2018, the Hon. Judge certified the Application urgent and directed service of this Application upon the Respondents for hearing inter-partes in Nairobi on 21.3.2018.

7. Despite service, the Respondent failed to attend Court on 21.3.2018 and so this day, the Court granted prayer No. 4 above. The Respondent also failed to honour the same order.

8. This prompted the Applicants to file yet another Application on 13.4.2018 under Certificate of Urgency seeking that the Respondents be directed to appear in Court to explain why they had not honoured the Court's orders.

9. The Respondents also filed an Application under Certificate of Urgency on 27.4.2018 seeking review of the Court's orders. They aver that the orders given by the Court to the Applicants were obtained without material disclosure.

10. They filed their Application through a Notice of Motion filed under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 and all enabling provisions of the law. They sought orders as follows:-

1. **THAT this application be certified as urgent and heard ex-Parte in the first instance.**

2. **THAT this Honourable Court do order a stay of execution of the order of the Court dated 21st March 2018 pending hearing and determination of this Application.**

3. **THAT this Honourable Court be please to review and set aside the order issued by Honourable Court in this matter on 21st March 2017 directing the Respondent to pay the Claimant his salary arrears from 1st November 2017 to March 2018 amounting to Kshs.2,728,063 and continue to pay the Claimant his monthly salary to the tune of Kshs.473,689/ = together with any salary increments with effect from January 2018 as and when they are due on a monthly basis pending the hearing and determination of the claim herein.**

4. **THAT the cost of this Application be provided for."**

11. The Application was premised on the following grounds:-

1. **THAT There is discovery of new and important matter or evidence which, after the exercise of due diligence, which was not within the knowledge of the Respondents herein when the order was made.**

2. **THAT the Claimants herein filed an application dated 14th March 2018 seeking the following orders;**

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2) That this Honourable Court do issue orders restraining the Respondent from withholding and or deducting the Claimant's salary owing from 1st November 2017 to March 2018 amounting to Kshs 2,728,063.00.

3) THIS Honourable Court do issue an order compelling and/or directing the Respondent to pay the Claimant his salary arrears and/or owing from 1st November 2017 to March 2018 amounting to Kshs 2,728,063/= and to continue paying the Claimant his monthly salary to the tune of Kshs 473,689/= together with any salary increments with effect from January 2018 and when they fall due on a month to month basis pending the hearing and determination of the Application herein.

4) THIS Honourable Court do issue an order compelling and/or directing the Respondent to pay the Claimant his salary arrears and [or owing from 1st November 2017 to March 2018 amounting to Kshs 2,728,063/= and to continue paying the claimant his monthly salary to the tune of Kshs 473,689/= together with any salary increments with effect from January DI 8 and when they fall due on a month to month basis pending the hearing and determination of the Claim herein.

5) THIS Honourable Court do issue a permanent and/or mandatory injunction restraining the respondent from withholding and/or deducting the Claimant's salary owing to him which by 31/03/2018 was Kshs.2,728,063/=.

6) Costs be provided for.

3. THAT the said Application was heard *ex parte* and the Honourable Court directed that the Respondents do pay the Claimant his salary arrears from 1st November 2017 to March 2018 amounting to Kshs 2,728,063 and continue to pay the Claimant his monthly salary to the tune of Kshs 473,689 together with the any salary increments with effect from January 2018 as and when they are due on a monthly basis pending the hearing and determination of the claim herein.

4. THAT the Claimant herein was issued with 2 notice of termination of employment dated 29th January 2018 as per the employment contract entered into on the 5th of March 2015 and his termination took effect from the 28th of February 2018.

5. THAT the Claimant herein therefore ceased to be an employee of the Claimant upon the lapse of the 30 days' notice being the 28th of February 2018.

6. THAT the Claimant herein has been paid all his dues under the contract of employment dated 4th March 2015 and the Respondents did not unlawfully withhold the Claimants salary.

7. THAT the Claimant herein did not work in the month of March 2018 and as such he is not entitled to the salary for the aforesaid month or any subsequent salaries from the month of March 2018 as he is not an employee of the Respondent.

8. THAT though Respondent is vested with the sole mandate of employing in Garissa Public Service, several members of Garissa County Government irregularly caused several persons employed in Garissa Public Service to receive irregular special salaries alongside receiving a normal basic salary contrary to the Law.

9. THAT the Claimant herein was irregularly and/or unlawfully awarded a basic salary of Kshs.132,249.00 and a special salary of Kshs.189,040 which was unlawfully and/or irregularly awarded to Claimant for over 3 years contrary to the Salaries and Remuneration Commission Regulations.

10. THAT the Claimant was called upon to explain the unlawful and/or irregular special salary and he refused neglected and/or declined to offer any justification for payment of a special salary in addition to the regular salary awarded to the Respondents employees.

11. THAT during his tenure as an employee of the Respondent the Claimant absconded without notice or sufficient grounds and when he was called upon to explain his absence from work he refused, neglected and/or declined to offer any explanation for neglecting his duties as per the contract of employment.

12. THAT that the Claimant was lawfully terminated by the Respondents in accordance with the Employment contract and the Employment Act and is not entitled to any of the reliefs sought in the Application dated 14th March 2018 and the statement of Claim dated the 14th March 2018.

13. THAT substantial loss will result to the Respondents if the orders sought are not granted as the sums sought by the Claimants are colossal sums and the same may not be recovered if the Application and Petition dated 14th March 2018 are dismissed if the orders herein are not reviewed.

14. THAT the Respondent was never served with the Statement of Claim or the application leading to the orders now the subject of this application.

15. THAT the Respondents have demonstrated sufficient reasons for review of the order aforesaid.

16. THAT this application ought to be granted in the interest of Equity and Justice”.

12. The main grounds in support of the Respondent’s Application is that the Applicant was lawfully terminated by the Respondents on 28/2/2018. They also aver that they were never served with the Statement of Claim on the Application leading to the subject of the Application.

13. Their Application was supported by the Supporting Affidavit of one Roble H. Mohamed, the Acting Garissa County Secretary. They attached annexures RM3 a copy of the Claimant’s pay slip, RM4, a copy of a letter dated 19.10.2017 indicating that the Applicant had absconded duty.

14. The Respondents also attached a letter addressed to the Applicant dated 29.1.2018 indicating that the Applicant’s services were being terminated with effect from 28/2/2018 and giving him the requisite one month notice of the said termination.

15. In reply to this Application, the Applicant filed a Replying Affidavit dated 4/5/2018 deponing that the Respondents have committed a perjury. He avers that the deponent of the affidavit in Respondent’s Application one Roble H. Mohamed is not the Acting County Secretary as deponed.

16. He avers that the letter purportedly addressed to him showing he had absconded duty date October 2017 and termination notice are all fake documents and misleading the Court. He avers that this is not a matter fit for review as orders sought to be reviewed were issued on 21/3/2018 while the alleged new evidence is dated 29.1.2018.

17. He avers that he never received the said letters as they do not bear his address and there is no proof of service upon him of the said letters. He avers that Roble Mohamed ceased to be Acting County Secretary when Mr. Abdi M. Ali was appointed County Secretary on 9.1.2018 and as per letter Appendix AMD6, he was in office on 28/2/2018.

18. He also attached documents to show communication he has had with the Respondents over time as proof that he never absconded duty.

19. The parties agreed to dispose of the Application in Court by way of written submissions.

20. I have examined the averments of the parties and the issues for determination are as follows:-

1. Whether the Respondents were served with the orders of the Court issued on 21.3.2018.

2. Whether the Applicant was dismissed by the Respondent on 28/2/2018.

3. Whether there is a new evidence to warrant review of this Court’s orders dated 28/3/2018.

4. What orders to grant in the circumstances.

21. On the 1st issue, the Applicant filed this Cause on 14.3.2018 before the Mombasa Employment and Labour Relations Court (ELRC) and it was registered as Cause No. 131/2018.

22. The Court certified the Application urgent and ordered that the same be served upon Respondent and be heard in Employment and Labour Relations Court (ELRC) Nairobi on 21/3/2018. When the Applicants appeared in Court on 21.3.2018, they had filed affidavit of service indicating that the office of the County Secretary of Garissa Count had been served on 16/3/2018. Indeed annexed to the affidavit were the application and summons and order duly affixed with a stamp of the County Secretary, Garissa showing receipt on 16.3.2018.

23. The Respondents have not denied the stamp on the said documents is from the Respondent’s office. The Respondent’s Counsel even wrote to Court inquiring about the authenticity of the order dated 21.3.2018 and the Deputy Registrar Hon. Mutai wrote back confirming that the same was an authentic order of this Court.

24. The issue of the Respondent not being served as alleged is therefore not true and I reject the said argument.

25. On the second issue, the Respondent have sought review of the Court’s orders on the ground that the Applicant failed to disclose material issues being that he had been dismissed in February 2018. The Respondents attached a letter dated 29/1/2018 addressed to Mr. Ahmed Dagan Mohamed. This letter does not bear the Applicants known address which is in his appointment letter is P.O Box 223-70100 Garissa. There is no evidence that the said letter was received by the Applicant as it does not bear his signature. The practice in government is to have documents delivered with a delivery book. No such evidence of delivery of the said letter is shown to this Court.

26. It is therefore my finding that though the Respondents want this Court to believe that the Applicant was terminated in February 2018, the termination if any has not been communicated to the Applicant and as such the issue of material non-disclosure by the Applicant cannot stand.

27. The Respondent want this Court to believe that the termination had already bene effected in March 2018. They are relying on a letter dated 29/1/2018. This letter of 29.1.2018 cannot be viewed as new evidence if it existed before.

28. In that case, the purported letter of termination cannot be used as evidence that existed to warrant termination and therefore review.

29. It is therefore my finding that there is no proper reason to warrant review and the application for review is denied. In the circumstances the order of Court dated 21.3.2018 will stand undisturbed.

30. In the circumstances, I allow the application by the Applicant dated 12.4.2018 and I order that summons be issued to the officer of the Garissa County responsible for paying the Claimant his salary to explain why the orders issued cannot be enforced.

31. Costs in the cause.

Dated and delivered in open Court this 16th day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties