



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 34 OF 2018

(Before Hon. Justice Mathews N. Nduma)

JULIUS OKELLO MUGA & 55 OTHERS PETITIONERS

VERSUS

COUNTY GOVERNMENT OF HOMA-BAY 1ST RESPONDENT

COUNTY PUBLIC SERVICE

BOARD HOMA-BAY COUNTY 2ND RESPONDENT

R U L I N G

1. Application dated 6th April, 2018 as amended on 19th April, 2018 is before court for determination.
2. The Application was granted *ex parte* in terms of prayers 1 and 4 of the Notice of Motion certifying the matter urgent and directing the Respondent to pay all the salaries and allowances arrears to the Petitioners/Applicants immediately and thereafter promptly pay the salaries and allowances as and when they fall due pending hearing and determination of the petition.
3. As at the time the Application was heard *inter partes* and date for ruling reserved, the Respondent had failed to comply with the interim orders by paying arrear salaries.
4. The initial Petition and application had only 14 Petitioners/Applicants. The interim orders of the court only related to the fourteen.
5. The amendment added 15th to 56th Petitioners/Applicants.
6. On 10th April, 2018 the Respondent dismissed the petitioners/Applicants from its employ.
7. The amended petition filed on 20th April, 2018 seeks to injunct the Respondents from implementing the decision to dismiss the Petitioners/Applicants and to restrain the Respondent from filling the positions previously held by the Petitioners/Applicants.
8. The application is premised on grounds set out on the face of the application to wit that the Petitioners/Applicants salaries and allowances were arbitrarily stopped since December 2017 while they continued working. That upon receipt of inter orders by the court, the Governor convened a press conference and announced the sacking of over 300 unnamed employees.
9. That the dismissal of the Petitioners/Applicants was without a hearing and or any due process.
10. That the Petitioners/applicants have letters of appointment signed by the Chief Officer, the 2nd Respondent. That the dismissals are malicious and discriminatory.
11. That the Respondents are in contempt of the court order and ought not to be accorded audience by the court until they purge the contempt.

Replying Affidavit

12. The Respondents filed a Replying Affidavit sworn by George Illah, the Principal Legal Officer of the Respondent.

13. The Respondent deposes that the Applicants are guilty of material non-disclosure and seek justice with unclean hands.
14. That the 1st Respondent established a task force that carried out staff audit and it established that ten (10) of the Petitioners/Applicants were irregularly/unproceduarally fraudulently employed.
15. That there was no competitive recruitment/employment request from the health department for the affected staff.
16. That there was no company Executive approval for the recruitment. That this was in violation of the Human Resource Policies and procedure manual for the public service, published in May 2016.
17. That the 2nd Respondent under section 75 of the County Government Act, 2012 is empowered to investigate an irregularity.
18. That the Petitioners/Applicants needed to lodge appeals within 90 days to the County Public Service Board.
19. That two (2) of the Petitioners, number 10 & 14 have been cleared and have been taken back to the payroll.
20. That Petitioners 8 and 13 cannot be traced in the 1st Respondent's records.
21. That the delay in implementing the court order was due to the closure of the payroll for the month.
22. The Respondent filed an affidavit of George Ouko Illah to prove compliance with the court order dated 6th April, 2018 on 7th June, 2018. A memo dated 17th May, 2018 is attached to the affidavit. The Memo is written to the payroll manager by the County Secretary Isaiah Ogwe, giving instructions for inclusion of the 14 Petitioners/applicants in the payroll and ensure that they were paid salaries from December 2017 till the determination of their case in court.
23. In the further replying affidavit by George Illah dated 14th May 2018 and filed on 15th May, 2012, he deposes further that the 1st Petitioner lacks authority to represent the other Petitioners since no authority was filed in terms of order 1 Rule 13 of the Civil Procedure Rules.
24. That the 10th and 14th Petitioners have disputed being part of the Petition nor having given the 1st petitioner any authority to sue on their behalf. Letters from the two are annexed to the affidavit.
25. The deponent concludes that the amended petition is ill conceived, misinformed and an abuse of the court process.

Determination

26. It is admitted by the Respondents that they owe salaries and allowances to the 14 Petitioners/Applicants from December 2017 until their respective last date at work and/or to date in respect of the 10th and 14th Petitioners/Applicants.
27. The exparte, interim injunction issued by the court on 6th April, 2018 in respect of the 14 petitioners/Applicants is confirmed. The Respondent is to pay them salaries and allowances in arrears forth with.
28. With regard to the application for injunction to stop the Respondent from terminating the services of the Petitioners/Applicants, it is admitted by the Petitioners/Applicants that the Respondents dismissed the Petitioners/Applicants from their employment on 10th April, 2018. The court cannot issue conservatory orders in respect of dismissals that have taken place. The horse has bolted from the staple as it were and the prayer to injunct the dismissals cannot be sustained.
29. With regard to the prayer to injunct the Respondents from appointing any other person(s) to the positions previously held by the Petitioners/Applicants, the applicants have not satisfied the requirements set out under the case of **Giella vs Cassman Brown Ltd** necessary for an injunction to be issued.
30. The Applicants bear the onus to show that they have a prima facie case with a probability of success. That they would suffer irreparable loss that cannot be remedied by way of damages, if the interim injunction is not granted and that the balance of convenience favours the grant of the injunction.
31. From the facts before court there is sufficient doubt as to the propriety in the manner the petitioners/Applicants were recruited to serve the 1st Respondent.
32. This doubt may only be canvassed and cleared once the matter is heard on the merits. The Respondents are Public Institutions and in the court's view, public interest favours the filling of the vacant positions in a transparent and open process.
33. Audit of doubtful personnel in government institutions is meant to engender accountability and transparency.
34. Accordingly, the court is not satisfied that the applicants have satisfied the preliquisites of granting an interim injunction and or

conservatory orders and finds that it is indeed in public interest that interim orders are not granted to stop dismissals of the Petitioners/Applicants from the service of the Respondents and to stop the recruitment process.

35. However, the interim orders issued on 6th April, 2018 directing payment of arrear salary and allowances from the month of December 2017 to the date of their dismissal is confirmed.

36. It is so ordered.

Dated and Signed in Kisumu this 5th day of July, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Kisera for Petitioners/Applicants

Mr. Nyauke for Respondents

Anne Njung'e – Court Clerk