



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1818 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JULIANA MUTISYA.....1ST CLAIMANT

CATHERINE NJERU.....2ND CLAIMANT

EMILLY ONGAGA.....3RD CLAIMANT

VERSUS

NATIONAL GENDER AND EQUALITY COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

There are three applications before the Court for determination; the first one is the one dated 16th January 2017, brought by the Claimants under Section 5 of the Judicature Act and Section 12(3) of the Employment and Labour Relations Act, seeking for orders:

1. That the Chairperson and the Commissioners of the National Gender and Equality Commission be committed to civil jail for a term of 6 months for disobedience of the ruling, order and decision of the court dated 4th February 2015.
2. That costs of the application be provided for.

The Application is premised on the grounds that:

- a. The Respondent has disobeyed the decision of the court dated 4th February 2015.
- b. The Respondent has shown contempt to the due process of the law.
- c. In a bid to scuttle the fruits of the ruling dated 4th February 2015 the Respondent has frustrated the implementation of the said decision.
- d. The Respondent has acted in utter contempt in its failure to pay to the 1st Claimant salary for the period she was illegally dismissal.
- e. The Respondent has resorted to acts of disobedience aimed at scuttling the decision of the court by failure to allocate work to the 1st Claimant and attempt to relocate her to anon-existing position or office.

The Application is supported by the affidavit of Juliana Mutisya wherein she depones that by a ruling delivered on the 4th February 2015 the court ordered as follows:-

1. That the Respondents be and are hereby restrained by themselves or their servants, agents, officers or any other person acting on their instructions howsoever from interviewing, sourcing, employing or in any other way whatsoever deploying any other persons to undertake the duties of the offices previously held by the Claimants in the 1st Respondent pending the hearing and determination of

this suit.

2. That a mandatory injunction against the 1st Respondent be and is hereby issued directing the 1st Respondent to reinstate the Claimants to their respective employment position.

That in its decision the court did observe and hold inter alia that Reinstatement refers to restoration of a former employee to his or her previous position after unfair or unlawful dismissal, demotion or transfer. Reinstatement involves no loss of earnings or entitlements accrued as a result of absence in service. This means the employee is deemed to have continued to perform work for the employer although was not at work at the material time and whereas reinstatement may seem like a formal remedy it is not .

That on 9th March 2015 the Respondent appealed against the decision and applied for stay of execution of the decision to the Court of Appeal which application was dismissed by the court. That despite the fact that the Claimant were reinstated to office pursuant to the said court order, the Respondent has violated and disobeyed the said order by failing to pay salary arrears for the months of October 2014 to February 2015.

She further depones that for a period of more than two years now after reinstatement the Respondent has not been allocating any work to her, which in her view has been an attempt to psychologically wear her down and frustrate her employment contract.

That on or about March 2016 the Respondent recruited one Sora Badu Katelo to occupy a newly created position of Director Corporate Affairs with the same job description as Ms. Juliana's office and abolished her position of Deputy Commission Secretary, Finance and Administration. On 14th September 2016, the Respondent wrote to her asking her to report for duty to head an office in Nakuru with effect from 28th September 2016.

That the Respondent has been taking the above steps in an effort to scuttle the decision of the court in this matter and those who show disrespect to the court process ought to be punished.

The 1st Respondent has opposed the Application and has filed a Replying Affidavit sworn by one Winfred Osimbo Lichuma wherein she states that the 1st Respondent has adhered with the impugned Court Orders to the letter by reinstating the Claimant back to the position she held previously and also by abstaining from employing any person to take over the Claimant's job pending the hearing and determination of the suit.

That it is not true that the 1st Respondent has failed to pay the Claimant's salary for the period for the said Order did not direct them to pay the 1st claimant any salary. Furthermore, the claimant did not report to work nor did she render any service to the 1st respondent during the said period to become entitled to any payment from the 1st respondent. That the 1st respondent being a public body can only pay for services rendered as to do otherwise would be illegal.

It is also alleged that the 1st claimant has refused to take instructions from the 1st Respondent yet she continues to enjoy huge salaries and that no evidence has been adduced to show that she asked for work from her supervisor who failed to allocate any to her.

As to the position that the 1st Claimant is alleging has been replicated in order to usurp her usefulness in the 1st Respondent Company, it is submitted that the two roles are markedly differed with different responsibilities.

That the Application by the Claimant is an abuse of the process of the Court and the same should be dismissed with costs.

The 2nd Application is by the 1st Respondent dated 31st January 2017, wherein the Applicant seeks for orders that:

1. This Honourable Court be pleased to dismiss this suit for want of prosecution.
2. The costs of this application and entire suit be borne by the Claimants.

The Application is premised on the grounds that the 1st Claimant herein having been an employee of the 1st Respondent was terminated on grounds of gross misconduct for alleged involvement in corruption.

That the 1st Claimant challenged the termination of her employment as aforesaid and filed this suit on or about 15th October 2015 seeking inter alia orders of reinstatement and injunction restraining the 1st Respondent from employing anyone to take over her previous position.

That on or about 15th February 2015 this Court issued a temporary order restraining the 1st Respondent from employing any other person to take over the 1st Claimant's position and also directing the 1st Respondent to re-instate the 1st Claimant pending the determination of the suit which the 1st Respondent avers they diligently did and the 1st Claimant continues to enjoy the orders.

That immediately the 1st Claimant obtained the said orders in her favour she stopped obeying lawful instructions given to her by the 1st Respondent and therefore ceased being answerable to the 1st Respondent maintaining throughout her allegiance is owed only to this court and not the 1st Respondent. As a result it is contended that she lost interest in prosecuting the matter for the last 22 months as at the time of filing the application.

The 1st Respondent avers that there is a real and serious risk that the 1st Claimant's contract will expire before the matter is heard and determined which will effectively render this suit nugatory. That the 1st Respondent continues to suffer great prejudice as they have been forced to operate without the services of a Finance Director for over twenty two (22) months and therefore urge the Court to allow the application and dismiss the suit for want of prosecution.

The Application is supported by the Affidavit of one Winfred Osimbo Lichuma who reiterates the grounds on the face of the application and restates that the 1st Respondent continues to suffer loss as a result of the pendency of the instant suit as they have been forced to operate without a finance director as a result for the orders in the suit.

The 1st Claimant has filed a replying affidavit to oppose the application by the 1st Respondent wherein she denies abusing the process of the Court stating that the reason why she did not set down the suit for hearing for the period in question, was due to the appeal against reinstatement filed by the 1st Respondent of which she was awaiting the outcome.

She alleges that the 1st Respondent filed an appeal and subsequently an application for stay of this Court's orders which were granted. From the date the interim orders of stay were issued the Claimant's advocates have been corresponding with the 1st Respondent/ Applicant herein, urging them to fully obey the court order but in vain.

That eventually the Claimant filed an application for contempt of court as a means of enforcing the court order. That in light of the application for contempt of the court orders no action could be taken in the suit. Furthermore that the 1st Respondent/Applicant herein has not filed any Witness Statement or List of Documents in compliance with Pre-trial preparations.

The 3rd Application is by the 1st Claimant dated 6th September 2017, where she seeks leave to be allowed to amend the Statement of Claim. She premises the application on the grounds that there has been material change to the relationship between the parties making it necessary for an amendment of the claim. That the amendment is necessary in order to determine the real issues between the parties and that no prejudice will be suffered by the Respondent as they will have to amend their pleading as well.

Claimant's Submissions

In regards to the Notice of Motion dated 6th September 2017 it is submitted that the Claimant seeks to amend the claim because the original claim as filed has been overtaken by events upon her reinstatement by the Court. That the Claimant now claims special damages in terms of their terminal dues which remain unpaid by the 1st Respondent. The draft amended Plaintiff is self-explanatory that it is only the 1st and 3rd Claimants who claim dues because the 2nd Claimant was paid all her dues. Part of the amounts claimed by the 1st and 3rd Claimants is salary for the period that they were under unlawful termination.

That the Grounds of opposition filed by the Respondent amount to mere statements of facts which are not evidence based. That the said grounds cannot be sustained since they inter alia seek to challenge the merits of the claim. Further, that the issue of delay has been explained in the Supporting Affidavit of the 1st Claimant, to wit, that there had been change of status part of which occurred in October 2017.

The Claimant urges the court to allow the application as prayed.

On the Application to dismiss the suit for want of prosecution, the Claimant restates the contents of her replying affidavit and prays for the Application to be dismissed.

On the application for contempt, the Claimant states that the law on the issue is established and urges the court to allow the application.

Respondent's Submissions

The 1st Respondent's submissions on the application to dismiss the suit for want of prosecution they state that no valid excuse has been given for the delay in prosecuting the Claim. The explanation proffered by the Claimants for abandoning the suit is that the 1st Respondent had intimated it would file an appeal against the interim order issued on 4th February 2015, and that the latter had in fact filed an Application for stay of execution of the same order at the Court of Appeal, which was dismissed. That even if the application for stay had been allowed it would not bar the proceedings of this court.

The 1st Respondent refers to the Claimant's Submissions wherein they expressly say that upon grant of the interim orders by this honourable court, the suit was overtaken by events. That this clearly confirms the position that the Claimants have used these proceedings to keep a court file open for utilization in the event something else comes up; and it indeed came up. This is an abuse of the court process and the suit herein should be dismissed with costs.

It is submitted that to avoid injustice and undue hardship to the Respondent, the court is empowered to dismiss such suits as this. They rely on the case of *Moses Mwangi Kimari v Shammi Kaniirapparambil Thomas & 2 others [2014] eKLR* where the honourable judge of the High Court outlined the principles guiding the court's discretion as follows:

“The law governing dismissal of suit for want of prosecution cannot be called upon to justify itself; it is well settled. I am content to cite a work of this court in the case of *Nairobi Hccc No. 32 of 2010, Utalii Transport Company Limited & 3 Others -V- Nic Bank & Another [2014] eKLR* that when the applicant states and correctly so/ that: "It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court". Then exhorts that "Over one year has lapsed without

the Plaintiffs taking any step to progress their case". And makes a strong conclusion that 'The Plaintiffs' inertia runs contra to the overriding objective of the court stipulated in section 1A, 1B and 3A of the CPA ".

The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgment-seat. It is, therefore, a matter of discretion by the court. See the opinions of Danckwerts, LJ in **NAGLE v FIELDEN [1966] 2 QBD 633 at p 648**, and Lord Diplock in **BIRKET v JAMES [1978] A.C. 297**. A great number of cases in the Court of Appeal have adopted that approach but I do not wish to multiply them. Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:

1. Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
2. Whether the delay is intentional, contumelious and, therefore, inexcusable;
3. Whether the delay is an abuse of the court process;
4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
5. What prejudice will the dismissal occasion to the plaintiff?
6. Whether the plaintiff has offered a reasonable explanation for the delay;
7. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?

That in the instant case the Claimants are guilty of delay and the suit on the Claimant's admission has been overtaken by events.

On the application for committal of the Chairperson and Commissioners of the 1st Respondent to civil jail, it is submitted that it is not clear whether the order sought is in light of execution process or contempt of court proceedings, because the prayers sought do not disclose the nature of the claim. That the Claimants aren't asking the court to hold the said officers of the 1st Respondent in contempt of court or to direct them to show cause why they aren't allegedly satisfying the order of the court. It is submitted that it is not clear what effect this Application is meant to have.

On behalf of the 1st Respondent it is submitted that the Application is founded on non-existent law. That the purported Section 5 of the Judicature Act was repealed on 13th January, 2017 by Section 38 of the Contempt of Court Act, 2016. Further, according to Section 30 of the said act, contempt of court proceedings against officers of a state organ (such as the 1st Respondent as defined in Article 260 of the Constitution) can only be carried out after the court has issued at least 30 days' notice to the accounting officer of the state organ asking them to show cause why contempt proceedings should not be commenced against the officer.

Further, that by the said provision of the Contempt of Court Act, such notice must be issued to the accounting officer and the Attorney General. In this case, the Claimants have never moved the court to issue such notice or to cause it to be served as required by the law. In addition to the foregoing, contempt of court proceedings with respect to a state organ can only be commenced against the accounting officer, who in this case is the Chief Executive Officer of the 1st Respondent.

It is submitted that the 1st Respondent obeyed the orders of the honourable court issued on 4th February 2015 by immediately reinstating the Claimants and refraining from appointing other people to their respective positions. That they were allowed to take up the same positions they held before the termination. Indeed the 1st Respondent had to bear with the Claimants' (particularly 1st Claimant) clear resistance to authority. That the 1st Claimant resisted and completely refused to obey a lawful and proper instruction of transfer from the Nairobi duty station to the one in Nakuru without any changes to her position, remuneration or duties. She would still report to the Chief Executive Officer as per her contract of employment. But she refused to obey the transfer instruction.

The Respondent submit that it is not true that the 1st Claimant was not given work or that her work was taken up by someone else. They submit that the 1st Respondent was entitled to employ such other officers as deemed necessary to take up duties arising and which were not performed by anybody else. That the order of the court did not bar the 1st Respondent from employing officers to take up duty in positions other than those of the Claimants.

That this Application was filed more than two (2) years after the Claimant was reinstated to work, and just a few months to expiry of her contract to frustrate the 1st Respondent and to validate her unlawful conduct.

It is also submitted that the 1st Claimant's claim for certain unpaid dues is premature as the same was the question awaiting determination before the court in the main suit. That the court has not yet made a determination whether or not the termination was proper, nor has it made such orders as to payment of any alleged arrears.

That the courts have made it clear that orders of contempt of court are quasi-criminal in nature and must be made where the case for contempt has been clearly and precisely pleaded and proved beyond a balance of probabilities. The Court of Appeal in the case of **Mutitika v Baharini Farm Ltd [1985] eKLR** notes that the breach alleged to have been committed by a contemnor must be precisely defined; that it

must be proved on a level higher than the balance of probabilities, especially given that the offence of contempt is of a criminal character and may attract imprisonment. The court also noted that the process of contempt should be utilised with restraint and the greatest reluctance because it is practically arbitrary and unlimited. The court should consider other civil remedies as a method of doing justice.

On the Claimants' application to amend the claim it is submitted that the Claimants are attempting to file a whole new suit altogether in the name of amending the claim. That they are keen to use this process of court to introduce new strange claims in the same suit so that they can pick up from where they abandoned the claim and obtain a fresh opportunity for new orders. That this is an abuse of the court process and it is in bad faith and the Application should be dismissed with costs.

Determination

There are three applications for determination herein.

I will start with the application for dismissal of suit for want of prosecution. The said application was filed on 31st January 2017.

At the time the application was filed, the claimant's application dated 17th January 2017 was pending in court. The respondents had even filed a reply to the said application on 27th January 2017. It was thus aware that some action had been taken in the case being the filing of the application dated 17th January 2017.

It is therefore apparent that the application was filed in bad faith as a reaction to the claimant's application for committal of the Chairperson of the 1st respondent to civil jail for disobedience of a court order.

Such application does not deserve any sympathy from the court. It is clearly an abuse of court process, especially so because the person who swore the affidavit in support of the application is also the same person who swore the affidavit in reply to the application by the claimants.

For these reasons I dismiss the application by the respondents dated 31st January 2017.

The second application for consideration is the one dated 17th January 2017. It seeks orders of committal of the Chairperson and Commissioners of the 1st respondent to civil jail for a term of six months for disobedience of the ruling, order and decision of the court dated 4th February 2015.

There are several issues about the orders alleged to have been disobeyed and the application itself.

In the first place, the persons sought to be jailed have not been cited for contempt. There is also no execution process that has been commenced against them. This means that the application is premature as committal to civil jail can only be resorted to in execution of an order after finding a party guilty of contempt, or in execution of a decree.

Secondly the grounds in support of the application are not consistent with the court orders alleged to have been disobeyed. The orders of the court were that –

1. "The respondents herein be and are hereby restrained by themselves or their servants, agents, officers or any other persons acting on their instructions howsoever from interviewing, sourcing, employing or in any other way whatsoever deploying any persons to undertake the duties of the offices previously held by the claimants in the 1st respondent pending the hearing and determination of this suit.
2. A mandatory injunction against the 1st respondent do issue directing the 1st respondent to reinstate the claimants to their respective employment positions."

The nature of the disobedience as stated in the application is that the respondent failed to pay the claimant's salary arrears for the months of October 2014 to February 2015. These are not the orders that were granted by the court.

Similarly, the orders as granted were prayers 3 and 4 of the application which are that they restrained the respondents from replacing the claimants and reinstated them back to work

This is what was stated in the ruling delivered on 4th February 2015 to the effect that –

"That upshot of the foregoing is that the application is allowed in terms of prayer 3 and 4 of the notice of motion application dated 15th October 2014."

The claimants have clearly stated that they were reinstated following the order of the court. Their reinstatement means they were not replaced. They have not stated which of the two prayers granted by the court were disobeyed by the Chairperson and Commissioners of the 1st respondent as both orders were complied with.

Further, the orders were granted on a temporary basis pending hearing and determination of the suit. The applicants cannot be seen to be attempting to enforce the orders two years down the line without having taken any steps to fix the suit for hearing.

The orders granted in respect of prayer 3 have also technically lapsed. Under Order 40 Rule 6, interlocutory injunctions not determined within 12 months from the date of grant shall lapse unless for sufficient reason the court orders otherwise. In the present case, the applicants have not come back to the court to seek extension of the orders.

It is therefore my finding that the prayers sought in the application dated 17th January 2017 are incapable of being granted for the reasons stated. And for the said reasons, I dismiss the application.

The final application is for leave to amend the memorandum of claim. In the original claim, the claimants had sought the following remedies –

- a. A permanent injunction to restrain the respondents, their agents and/or servants from recruiting other persons for the positions previously held by the Claimants.
- b. A declaration that the termination of the Claimants' employment by the 1st Respondent amounts to unfair/unlawful termination.
- c. An order that the Claimants are immediately reinstated to work in the 1st Respondent in the positions they previously held.
- d. In the alternative, maximum compensation in damages for unfair/unlawful termination.
- e. Any further relief deemed fit by the court
- f. Costs of the suit plus interest.

In the draft amended claim it is stated at paragraphs 33 and 34 that the 1st and 3rd claimants resigned from employment in April 2015 and September 2015 respectively. The prayers they seek to include in the amendments are for terminal dues following their resignation.

I find that the orders of the court dated 4th February 2015 addressed all the issues in the memorandum of claim and the amendments sought are not consistent with the claim as filed. An employee who has resigned from employment cannot seek prayers for terminal dues in the same claim in which the employee seeks the prayers of reinstatement as in the memorandum of claim herein. The prayers are contradictory and would cause embarrassment to the respondent to defend.

What the claimants who have resigned should do is withdraw from the suit and file fresh suits for payment of their terminal dues. For the foregoing reason the application to amend the memorandum of claim is also dismissed.

The upshot is that all three applications are dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE