



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 323 OF 2017

FRANKLIN J. B. CHABARI.....CLAIMANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1ST RESPONDENT

THARAKA NITHI COUNTY PUBLIC SERVICE BOARD...2ND RESPONDENT

RULING

1. Before me is the Claimant/Applicant's Notice of Motion Application dated 10th April 2018 and the Respondents' preliminary objection dated 17th May 2018. The Claimant/Applicant seeks through his notice of motion for mandatory orders compelling the Respondents to pay his salary as Director, Urban Development of the 1st Respondent pending the determination of the suit as well as an order for committal of the County Secretary of the 1st Respondent and the Chairman of the 2nd Respondent for disobedience of a court order. The motion is supported by the Claimant's affidavit and grounds on the face of it. The preliminary objection by the Respondents seeks the striking out of the notice of motion on grounds that it is fatally defective and that the Claimant has not complied with the relevant mandatory provisions of the Contempt of Court law applicable and that the court lacked the jurisdiction to entertain the motion.

2. Parties were to file submissions and this was done on 4th July 2018 by the Respondents and on 2nd October 2018 by the Claimant. In the submissions by the Respondents, it was argued that the Claimant was deemed to have admitted the assertions by the Respondents as he had not filed an affidavit to controvert what the Respondents had averred. Reliance was placed on the decision of **Standard Resource Group Ltd v Attorney General & 2 Others [2016] eKLR** for this proposition. The Respondent further submitted that the Claimant in fact owed the 1st Respondent money being overpayments for the scale he was appointed to and from the order of 19th September 2017. The Privy Council case of **T. P. Jaroo v Attorney General (2002) 5 LRC 258, [2002] UKPC 5**, was cited for the proposition that a suit which is valid upon the filing of the same may be overtaken by events which occur after it is filed with the consequences that its prosecution becomes an abuse of the process of the court. It was submitted that the prosecution of the case was an abuse of the court process as the Claimant's position was untenable. The Respondents submitted that there can be no estoppel against a statute and relying on the case of **Tamal Industries Ltd v**

Respondents' position that no court can enforce an illegal contract per the finding in **Heptulla v Noor Mohamed [1984] KLR 58**. The Respondents urged the dismissal of the Claimant's application with costs.

3. The Claimant submitted that the motion was straightforward and fit for grant as there was a consent order that settled that the Claimant was to continue to serve the 1st Respondent on terms and conditions of service prevailing on 30th August 2017 pending a decision of the 2nd Respondent on the notice to show cause process which commenced on 12th September 2017. He submitted that the Respondents had withheld the Claimant's salary from March 2018 yet he was still in employment and despite the court order. He submitted that it was trite law that the question of the legality of the contract was yet to be determined and reliance was placed on the case of **Africa Management Communication International Limited v Joseph Mathenge Mugo & Another [2013] eKLR** which cited with approval the case of **Teachers Service Commission v Kenya National Union of Teachers & 2 Others [2013] eKLR** per Ndolo J. where the learned judge held that courts will punish for contempt to safeguard the rule of law which is fundamental to the rule of law and is about safeguarding the rule of law and not placating the applicant who moves the court. It was submitted that under the provisions of Part IV of the Employment Act, an employer has no right to withhold an employee's salary without just cause. The Claimant urged the court to hold that the Respondents are ridiculing the court and the entire judicial system and the orders given should not be in vain.

4. The preliminary objection taken by the Respondents is taken as a reply to the motion by the Claimant. It is therefore not the intention of the court to delve into the matter of jurisdiction exclusively since the arguments raised are not on pure points of law as envisaged in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** where Law JA held as follows:-

"So far as I am aware, a preliminary objection consists of a point of Law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Sir Newbold P. stated in the same decision as follows:-

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and, on occasion, confuse the issues. This improper practice should stop."

5. The objection raised by the Respondents does not meet the threshold in **Mukisa Biscuits** above and the preliminary objection filed is therefore treated as grounds in opposition. The Claimant submits that the Respondents have disobeyed court orders and seeks the punishment of the Respondents for this infraction. The Respondent on its part argues that the court cannot enforce an illegal contract and relies on the rule in **Mapis** (citation above). The case of **Mapis Investment (K) Ltd v Kenya Railways Corporation** was cited for the proposition that the court could not sanction the unenforceability of an illegal contract. The Respondents position on this is entirely erroneous. The court is yet to hear the merits of the matter as to enable it to make a determination that the Claimant's contract is illegal so as to bring the enforcement of that contract within the purview of the rule in **Mapis**. In the **Halisbury's Laws of England 4th Edition Vol 16 (1A) para 18**, it states that *a contract of employment will not be enforced if it based on a consideration which is wholly illegal and the ordinary law of contract will apply. A finding of illegality means, however, not only that no common law claim may be maintained on the contract, but also that the employee subject to the contract loses any statutory employment rights which rely on his having been an employee under a contract of employment, in particular the right to claim unfair dismissal*. The Claimant is alleged to have such a contract and he asserts that the Respondents have failed to comply with court orders. The matter of contempt is not novel. Contempt of court is governed by the Contempt of Court Act, 2016 and contempt of court is defined by Section 4 of the Act as follows:-

4.(1) Contempt of court includes —

(a) civil contempt which means willful disobedience of any judgment, decree, direction, order, or other process of a court or willful 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 willfully 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.

6. The power to punish for contempt is geared to insure that the authority and dignity of courts of law is achieved for the effective and efficient maintenance of law and order. To rephrase the English philosopher Thomas Hobbes memorable description that life outside civilized society would be '*solitary, poor, nasty, brutish, and short*'. Law and order are key components of civilized life. In this context, where there is willful disobedience of court orders. Life without the law, as we know it, would be poor, nasty, brutish and extremely short. That said, the Claimant did not move the court in the manner prescribed under the Contempt of Court Act. He had to undertake a more precise shot at the alleged contemnors if the Court was to take action.

7. The Claimant fell short of this threshold and therefore the inquiry and the consequent issuance of orders of citation cannot lie. The Respondent on its part asserts that there are misdeeds of a criminal nature regarding the contract. I am afraid that has to abide a hearing on the merits for the court to determine the accuracy of the surmise by the Respondent. Regarding the payments, it is the position of the Claimant and the Respondent that disciplinary proceedings have taken place.

That somewhat alters the relief the Claimant can claim in the motion. The upshot of the foregoing is that the Claimant's motion is devoid of merit and the same is dismissed but with no order as to costs.

It is so ordered.

Dated and delivered at Meru this 5th day of October 2018

Nzioki wa Makau

JUDGE