



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2292 OF 2014

WILLIAM MALII MWANZIA.....CLAIMANT

VERSUS

GENERAL MOTORS EAST AFRICA LTD.....RESPONDENT

RULING

Introduction

1. The Claimant has brought the Notice of Motion dated 20.3.2017 seeking the following orders:-

(a) THAT the Honourable Court be pleased to cite RITA KAVESHA the Managing Director of the Respondent for contempt of Court Orders by ordering for the attachment and sale of the contemnors' property and apply the same as compensation to the claimant for disobeying the Court Orders given on 4th March 2015.

(b) AND IN ALTERNATIVE the Honorable Court be pleased to commit the contemnor MS. RITA KAVESHA to jail for a period of Six (6) months or any other period that the honorable court deems fit and or until the purge the contempt and or such further orders as may be just..

(c) THAT the contemnor MS. RITA KAVESHA do purge the contempt by deploying and or allocating duties to and paying the claimant progressive monthly salary and allowances including salary for the month of January, February, March, May , June, July, August, September, October, December 2015. January to December 2016. January 2017 and February. 2017 amounting to Kshs. 1,885.690.00 forthwith.

(d) THAT the cost of this application be borne by the Contemnor.

(e) Certificate of Service.

2. The application is supported by Affidavit sworn by the Claimant on 20.3.2017 and the main grounds are:

(a) the court granted ex parte injunction on 23.12.2014 restraining the respondent from retiring the Claimant.

(b) the court confirmed the said injunction on 4.3.2015 after inter parte hearing and thereby restrained the respondent from retiring the Claimant pending final determination of the suit herein.

(c) the orders were served on the respondent and her Managing Director (MD) failed to ensure that the respondent complied with the said orders.

3. The application is opposed by the respondent through the Replying Affidavits sworn by M/s. Rita Kavesha, M/s. Alice Aluko, Fred Wasikei and Mr. Anthony Musyoki on 10.4.2017 and by Kelvin Kiruja on 11.4.2017.

The gist of the said Replying Affidavit is that:

(a) the order dated 4.3.2015 was communicated to the respondent by the Advocate on record after it was passed.

(b) On 14.12.2016, a stranger attempted to serve the order on the respondent legal officer, Mr. Anthony Musyoki but it was declined and the man was directed to serve the respondent's Advocate on record but he left the order on the floor.

(c) The order was never served on the respondent's Managing Director, M/s. Rita Kavesha on 14.12.2016 as alleged by the process server in his affidavit of service sworn on 3.1.2017.

(d) the Claimant never reported back to work after the said order was passed.

Background facts

4. The Claimant was employed by the respondent as Paint Shop Artisan on 27.2.1978 and rose to the rank of material Handler earning kshs. 38,333 plus House Allowance of Kshs.10,000 per month. He worked continuously until 17.12.2014 when he received a letter from the respondent indicating that he was due to retire on 1.1.2015. According to the Claimant that was premature retirement because he was 56 years and under the Respondent's Manual and Regulations, the mandatory retirement is 60 years. He therefore brought this suit seeking declaration that his retirement at the age of 54 years was premature and prayed for permanent injunction to restrain the respondent from retiring him before attaining the age of 60 years. In the alternative he prayed for Kshs.1,933,332 being the salary plus allowances he would have earned in the 48 months remaining before attaining the age of 60 years.

5. The respondent has denied that the alleged premature retirement of the Claimant and contended that he was properly retired under the provisions of the Collective Bargaining Agreement (CBA) negotiated between her and the Claimant's trade union and governs the contract of employment between the Claimant and herself.

She contended that under the said clause 22 of the CBA the mandatory retirement age of all unionisable employees is 55 years and not 60 years. She further contended that the contract of employment between her and the Claimant was not governed by terms and conditions of the General Motors East Africa Staff Retirement Benefits Scheme which is an independent entity from her. She therefore prayed for the suit to be dismissed with costs.

Applicant's submissions

6. The applicant submitted that the court has jurisdiction to punish for contempt under order 40 rule 301 of the **Civil Procedure Rules**, and **Section 5** of the Judicature Act. He further submitted that the court granted interlocutory orders on 4.3.2015 restraining the respondent from retiring the Claimant pending the hearing and determination of the suit herein. That the said order was never set aside or appealed from but the respondent has disobeyed it by refusing to admit the Claimant back to the company.

7. The applicant further submitted that the compliance with court orders has everything to do with upholding the dignity of the court and adherence to the rule of law. That the respondent admits that she was always aware of the injunction order and was again served on 14.12.2016, That the respondent through the Managing Director is treating the said order with unbridled contempt with blatant impunity and should stop forth so that the dignity authority of the court is upheld.

8. The applicant has denied the allegation by the Respondent's Managing Director that she halted the retirement process and blamed him for not reporting back. He however contended that the respondent has never written to him directing him to report to work and urged for the punishment of the Respondent's Managing Director for the failure to ensure that the order of injunction was complied with by the respondent. He contended that the Managing Director was aware of the said orders even if she was not personally served on 14.12.2016. He proposed that the Managing Director be punished by ordering her to compensate him for the contempt or being jailed until she purges the contempt by deploying the Claimant and paying him his salary from 23.12.2014 till the date of the application (4.5.2018) which stood at Kshs. 3,113,130.

Respondent's Submissions

9. The respondent submitted that the application is brought in bad faith and it is an attempt to resurrect the Notice of Motion dated 17.6.2015 which was dismissed by the court on 3.8.2015 and which sought similar orders against her Managing Director. She therefore prayed for the present application to be dismissed for being *res judicata*. She relied on **Hellen Atieno Mboya vs. Eagle Millers Limited [2017] eKLR and Heritage Insurance Company Ltd vs. Patrick Kasina Kisilu [2015]Eklr.**

10. The respondent further contended that her Managing Director should not be cited for contempt because she was not personally served with order dated 4.3.2015, and she has not wilfully disobeyed the said order. She further contended that the application against the Managing Director is founded on falsehoods about the service of order on 14.12.2016. She contended that the person who went to serve the order on 14.12.2016 never identified himself as Peter Muendo Keli and he remains a stranger to the officers he met at her premises. She however maintained that the Affidavit of service sworn on 3.1.2017 by Keli, as process server, purporting that he served the order on the Managing Director personally is false and he should be held to be in contempt as it happened in the previous applications for contempt that was dismissed by Nzioki Makau J. She relied on the chronology of events about the service of the order on 14.12.2016 as deponed in the five Replying Affidavits sworn by her five officers including the Managing Director and urged that there was no personal service on the Managing Director or her office.

11. On the other hand, the respondent contended that the person who has failed to comply with the order is the Claimant by not reporting back to work and by not prosecuting his suit before the end of June 2015 as directed by the said order. That he persisted in absconding duty despite being retained in the employment roll and as such he is liable for summary dismissal. The respondent, therefore denied that the Claimant is entitled to any salary as prayed.

Analysis and Determination

12. There is no dispute that this Court granted interlocutory injunction orders on 4.3.2015 restraining the respondent from retiring the Claimant pending the hearing and determination of this suit.

The issues for determination are:

- (a) whether order was served on the respondent's Managing Director personally.
- (b) whether the Managing Director has wilfully disobeyed the said order.
- (c) Whether the orders sought should be granted

Personal Service on the Managing Director

13. After careful perusal of the Replying Affidavits filed by respondent's Managing Director and other officers, I am persuaded to find on a balance of probability that the Managing Director was never served with the order dated 4.3.2015 personally. From the chronology of events of 14.12.2016 when the process server went to serve the order, he was not able to access the administration block to serve the same on the company lawyer Mr. Anthony Musyoki because he was not there. Instead he was directed to the Customer Care Centre where the lawyer was and upon being told by the lawyer that he was aware of the order and that it should be served through the Advocate on record herein, the process server left the orders on the floor and walked away without personal service on the Managing Director.

14. The foregoing want of personal service is however not enough protection from punishment for contempt if it can be proved that the contemnor was aware of the orders in question. In this case the Managing director was aware of the order before 14.12.2016. In **Basil Criticos vs. Attorney General and 8 Others [2012]eKLR** Lenaola J. (as then was) held that:

“... the law has changed and as it stands today, knowledge supersedes personal service.. where a party clearly acts and shows that he had knowledge of a court order; the requirement that personal service must be proved is rendered unnecessary.”

Wilful disobedience

15. The applicant contends that the Managing Director is in contempt of the court order dated 4.3.2015 by failing to ensure that the order is complied with by the respondent. The respondent has denied the alleged contempt and contended that it is the Claimant who failed to comply with the order by not reporting back to work. That the only time he came to the respondent's premises was after working hours or at about 10.30 am after the reporting time, allegedly to deliver his Advocate's letters. That the Claimant further failed to prosecute his case by end of June 2015 as ordered.

16. After careful consideration, I have found that the respondent and by extension the Managing Director did not wilfully disobey the order dated 4.3.2015. First I agree with the respondent that the Claimant never reported back to work as ordered by the court. If he did so he has not adduced sufficient evidence to prove that. Secondly, I am of the view that the compliance with the said court order was also not practicable until evidence is taken at the trial to ascertain whether or not there was any contract binding the parties after the age of 55 years. It would appear that the Claimant is importing terms from the Pension Scheme to the employment contract without consent from the employer.

Orders sought

17. In view of the foregoing finding that the respondent has not wilfully disobeyed the order dated 4.3.2015, I decline to cite the respondent's Managing Director M/s. Rita Kavesha for contempt. I further decline to award the salary sought until trial and determination of the claim on merits.

Conclusion and Disposition

18. I have found that the respondent and by extension her Managing Director M/s. Rita Kavesha was aware of the injunction order dated 4.3.2015 but there was no personal service on the Managing Director. I further found that the respondent and by extension the Managing Director did not wilfully disobey the said injunction order. I have also found that the claim for salary from 23.12.2014 is an item for trial and shall await judgment.

Consequently, the application dated 7.5.2018 is dismissed with costs.

Dated, Signed and Delivered in Open Court at Nairobi this 2nd day of November, 2018

ONESMUS N. MAKAU

JUDGE