



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

PETITION NO.13 OF 2017

JOSEPH MBURU GATHURU & 28 OTHERS.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF NAKURU.....RESPONDENT

RULING

1. The ruling herein relates to two (2) applications one dated 31st July, 2018 filed by the Petitioners and the other dated equal date filed by the respondent.

2. Application by the petitioners is seeking for orders that;

1. ...

2. *Summons do issue to the (A) County Secretary and head of Public Service,*

(B) Chief Officer – Public Service Management, (C) Secretary – County

Public Service Board to show cause why decree dated 4th June 2018 has not been complied with.

3. *The court do fin that A) County Secretary and head of Public Service, (B) Chief Officer – Public Service Management, (C) Secretary – County Public Service Board are in contempt of the Court Orders and Decree dated 4th June 2018 and proceed to punish for contempt by committal to jail and/or fines.*

4. *Costs be in the cause.*

3. This application is supported by the affidavit of Joseph Mburu Gathuru and on the grounds that the consent orders have not been complied with as agreed upon by the parties. The respondent has issued notice to one petitioner Vincent Borura Sure in total disregard of the consent orders and the petitioners are apprehensive that the respondent is determined to disregard court orders. Such will result in suffering, irreparable loss and damage.

4. In reply the respondent has filed the Replying Affidavit of Benjamin Njoroge the County Secretary and the Head of the Public Service for the respondent and who avers that instructions giving rise to the consent judgement were given by the chief officer, Public Service Management and who has since left the employment of the respondent. such instructions were given without the consultation and advice of the County Public Service Board which has the mandate on human resources management for the respondent.

5. Mr Njoroge also avers that with regard to the contempt proceedings, there is not evidence of service upon the cited officers and or they were parties to the instructions and letters giving rise to the consent judgement. There is no deliberate effort by the respondent to defeat justice as material relied upon to record consent judgement is challenged.

6. The respondent in the application is seeking for orders that;

1. ...

2. *Pending the hearing and determination of this application this court be pleased to stay execution and or suspend the enforcement and/or implementation of the consent judgement vide decree issued on 4th June, 2018 and all other consequential orders.*

3. *Pending the hearing and determination of this application this court be pleased to stay the contempt proceedings instituted in*

respect of the consent judgement vide decree issued on 4th June, 2018.

4. The court be pleased to discharge, set aside and or review the consent judgement giving rise to the decree issued on the 4th day of June, 2018 as the orders herein are detrimental to the running as well as operations of the Nakuru County Government and the matter do proceed for hearing and determination.

5. *Costs be in the cause.*

7. The application is supported by the Affidavit of Benjamin Njoroge and on the grounds that the petitioners did not disclose material facts in the process leading to the consent being the basis of the judgement in the matter the respondent entered into the consent as a result of concealment of a material fact and misrepresentation of the truth as to the entitlement of the petitioners.

8. Other grounds in support of the application are that the respondent was ignorant of material facts as the following petitioner are not in the County records as casual employees or retained by the County in any other capacity being;

- a) Francis Saleh Ngige,
- b) George Nganga Muchina,
- c) John Meirigi Karanja,
- d) Moses Wanjohi,
- e) Carol Wambui Njau,
- f) George Alex Ongoya,
- g) Wycliffe Karani Busaka,
- h) Nehemiah Wanjohi Kamau,
- i) John Nganga Muigai,
- j) Anthony Githinji Thiongo,
- k) Grace Nyawira Maina, and
- l) Charles Mburu Nganga.

9. The consent order entered by the parties had a mutual mistake that caused parties to believe that all the petitioners were casual employees with the respondent. the result of the consent was as a result of fraud as the respondent was induced to act to its detriment with the effect of imposing employees whom the respondent did not wish to retain. There was failure of consultation with the County Service Public Board as to the viability of the retention of the petitioners on a permanent and pensionable basis.

10. Other grounds are that it is the mandate of the County Public Service Board to change the terms of employment as the consent terms resulted to rewriting the contracts between the petitioners and the respondents and thus the role of the County Public Service Board was overlooked. Instructions to record consent were given by the Chief Officer, Public Service Management Mr Philip Sigei who has since left the employment of the respondent.

11. The consent judgement has long term implications as there was no appreciation of the effect of the retention of the petitioners on a permanent and pensionable basis with regard to performance of each employee, availability of funds or availability of work. Some of the petitioners are due of retirement in a few years and no purpose will be served by their retention.

12. The advocate for the respondent while entering the consent failed to take into account and appreciate all the issues and facts pertaining to the matter. The consent was given without sufficient material facts and in the interests of justice it should be stayed and the contempt proceedings stayed to enable the court hear the parties on their case.

13. In the affidavit of Benjamin Njoroge he avers that he is the County Secretary and the Head of the Public Service with the respondent and conversant with the matters herein. The petition is premised on facts that the respondent issued general notice dated 21st June, 2017 seeking to disengage casual employees and the petitioners are seeking the relief to be retained on permanent and pensionable basis and in the alternative be disengaged in accordance with the law.

14. Subsequent to the petition, a consent judgement was entered on 4th June, 2018 and decree issued that the petitioner be issued with appointment letters as permanent and pensionable employees with effect from 1st July, 2018 and there be payment of arrears and the orders be served upon the County Secretary and Head of Public Service, Chief Officer – County Public Service Board and the Secretary – County Public Service Board. The matter was also marked as closed.

15. This consent arose from material non-disclosure and without consultations with key officers in the respondent County Public Service Board and application should be allowed in the interests of justice by orders of stay of the consent judgement.
16. In reply, the petitioners through the Replying Affidavit of Joseph Mburu Gathuru avers that the consent judgement was entered by the parties with full knowledge and in total consideration of the consequences therein. The same was done in writing by both advocates for the parties.
17. The petitioners alleged not to be the employees of the respondent were on the payroll of the respondent, were issued with letter, appear on the daily attendances and statement as proof they were in the service of the respondent. Officers of the respondent are in contempt of court and should be punished. The consent order was signed by the respondent's advocate upon instructions by the Chief Officer, Public Service Management Mr Philip Sigeti and therefore valid. The respondent has therefore not met the legal threshold for the setting aside of the consent judgement.
18. The alleged fraud is without particulars. Such allegations should be disregarded by the court.
19. On record are two consents recorded by two different advocates representing the respondent in two instances. The orders entered are specific and court directed service upon specific officer of the respondent. The consent order adopted on 14th May, 2018 and decree of 4th June, 2018 were served on the respondent on 6th June, 2018.
20. There exists valid orders of the court and the respondent has failed to comply.
21. The petitioners also filed their Further Replying Affidavit and by Joseph Mburu Gathuru and avers that the respondent retained all the petitioners on the master rolls from August, 2014 to December, 2017 which is proof that they were the employees of the respondent.
22. Parties filed written submissions.
23. The petitioners submit that the consent order and judgement on 14th May, 2018 is valid and should not be stayed. No sufficient reasons have been given to warrant the setting aside of the consent order. The principles for setting aside a consent judgement are elucidated in the case of **Brook Bond Liebig (T) Ltd versus Mallya [1975] EA** such being on the basis of fraud, collusion or misrepresentation, concealment of material facts to induce another to his detriment and for lack of express negative direction.
24. The petitioners also submit that an advocate has general authority to compromise the suit on behalf of his client which must be acted upon in good faith, should not be contrary to express negative instructions, not sourced through fraud or collusion or contrary to the policy of the court, the consent is given with sufficient material facts and it is without misapprehension or in ignorance of material facts. The averments by the respondent that their advocate did not have express instructions to compromise the suit are not supported by any material evidence.
25. The consent on record was entered into in writing and adopted in the presence of both advocates for the parties. There are no valid reasons given for the setting aside of the consent judgement.
26. The petitioners also submit on the validity of the consent, the application by the respondent seeking to set aside the consent judgement and a stay of contempt proceedings should be dismissed. The consent judgement is specific and directed to officers of the respondent who were served and are aware of the judgement of the court but have failed to comply.
27. In submissions, the respondent in response to the petitioners' application and states that the cited officers with regard to contempt application should not be allowed as the officer who gave instructions leading to the consent judgement was Chief Officer, Public Service Management and who has since left the employment of the respondent. There was no consultation with the County Public Service Board charged with the mandate of advising the respondent on human resource management and whose role was overlooked.
28. The respondent has moved the court through application seeking to stay the consent judgement and decree of 4th June, 2018 and for stay of contempt proceedings commenced by the petitioners against its officers. There are sufficient reasons and good cause as to why the respondent has not complied with the consent judgement.
29. The notice issued to the respondent officers is by one petitioner in a letter authored by the County Enforcement Commander, Nakuru East Sub-County. However there is no evidence that the order was served upon the cited officers or that they are aware of the consent judgement.

Determination

30. It is common cause there on 15th May, 2018 parties herein entered consent judgement and a decree issued on 4th June, 2018. The petitioners have moved the court to enforce the decree and cited the respondent officers in contempt proceedings. The respondent has moved the court seeking to stay the consent judgement and the contempt proceedings.
31. On the two applications, one seeking committal proceedings against the respondent officers and the other seeking the stay of such proceedings and the stay of the consent judgement and decree of 4th June, 2018, both emanate from such consent judgement and issues intertwined and therefore shall be addressed together.
32. The petitioners have based their application and contempt proceedings on the provisions of Order 40 Rule 7, Order 51 and Rules 1, 2, 3,

and 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. That the cited officers being;

County Secretary and head of Public Service,

Chief Officer – Public Service Management,

Secretary – County Public Service Board

33. Are in contempt of the court orders and decree dated 4th June, 2018 and therefore should be punished or fined.

34. The Civil Procedure Act and the Rules thereto serve an important purpose of ensuring each party is given a fair chance to make good a claim against them and once judgement or an order of the court has been made against such a party, there is notice sufficient to have such a party to comply. Execution proceedings are set out under Order 22 and or 25 of the Civil Procedure Rules.

35. Before a party can be cited in contempt proceedings in a money decree or a decree requiring specific performance, the motions precedent under the Civil Procedure Act and the Rules thereto must be applied. Contempt proceedings only arise as the last option upon efforts to execute under the Rules and a party is unable to.

36. To apply contempt proceedings in a proper case where the Civil Procedure Act or the rules should serve is to circumvent an otherwise well applied rules of execution which have well served litigants for many years. I find no justification for not using these procedures in this case before arriving at the current application citing officers of the respondent in contempt. See **M Mwenesi versus Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000.**

37. Upon application of the appropriate procedure, the court should address and ensure the petitioners enjoy the fruits of the consent judgement.

38. The above put into account, On the application by the respondent seeking to stay the consent judgement and decree of 4th June, 2018 the grounds on the same is that the same was obtained through non-disclosure of material facts and therefore obtained as a result of concealment and misrepresentation of the truth as to the entitlement of the petitioners. That the officer who gave instructions to the consent judgement was the Chief Officer, Public Service Management and who has since left the employment of the respondent. such officer failed to seek and consult with the County Public Service Board on matters regarding the consent judgement.

39. It is imperative to note that the respondent herein is the County Government of Nakuru, a devolved government under the provisions of Article 2 of the Constitution, 2010. Under such provisions, the respondent as a County government under Article 183 of the constitution read together with the provisions of section 57 and 58 of the County Government Act, 2012 sets out the functions of the County Public Service Boards (the Boards or Board). Such Boards have the mandate to organise the human resource functions of the County government and fundamentally, section 67 requires that each Board must evidence all appointments in writing.

40. The consent judgement is premised on instructions issued by the Chief Officer, Public Service Management for the respondent. such mandate to give instructions for the consent judgement is now challenged on the basis that such officer did not consult and had no authority to act as he did.

41. On 9th October, 2017 the respondent entered appearance through the Ag. County Attorney.

42. The next day, 10th October, 2017 consent was filed between the parties with the respondent being represented by the same advocate in the capacity of *Advocates for the Respondent*.

43. On 25th July, 2018 the respondent filed *Notice of Change of Advocates* by replacing the *County Attorney* with a law firm of advocates.

44. These details are important for the reason that a *County Attorney* or an *Ag. County Attorney* is an employee of the respondent, County. Mandate and instructions are sourced from the employer and from the duty bearer, the accounting officer for the County Government.

45. The appointment of a firm of advocates changes that. The principle is that such a firm of advocates in making any representations in court unlike the employee of the respondent is bound by the rules and principles to act *bona fides*, act in accordance with given instructions from the client and not to act contrary to the policy of the court.

In this case, when the consent judgement was obtained on 14th May, 2018 the *ag. County Attorney* was on record as representing the respondent. did such officer have authority through the Chief Officer, Public Service Management to enter consent judgement for the respondent?

46. In view of article 2 of the constitution, 2010 read together with the County Government Act, 2012 the court finds the Chief Officer, Public Service Management is not the authorised accounting officer for the County government and the respondent herein. On the challenged consent judgement as having been obtained without the consultation and approval by the respondent or through its appointed advocates, the court must recall the consent judgement and reassess its veracity and import.

47. Upon notice of the slightest illegality, the court should stop and address as held in **Kenya Airways Co. Limited versus Satwant Singh Flora [2013] eKLR;**

... no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicate din the illegality.

48. The authority of the Chief Officer, Public Service Management for the respondent to give instructions for the consent judgement is challenged. The attendance of the *Ag, County Attorney* on the basis of instructions by a person without the requisite authority, mandate or power cannot apply to enforce and order so obtained.

49. This is to ensure the ends of justice are achieved. Where the petitioners have a good case, such cannot abet by the recall of the consent judgement and where there is a good defence, such should not be closed through the impugned consent judgement.

Accordingly, on the findings above, the contempt proceedings are hereby stayed. The consent judgement and decree of 4th June, 2018 is hereby set aside. On this basis the parties shall go back to the position subsisting as at 14th May, 2018. Hearing of the petition shall be on priority basis.

Dated and delivered at Nakuru this 1st day of November, 2018.

M. MBARU JUDGE

In the presence of: