



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1178 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 11th December, 2018)

JAIRUS KATERE SHIAMALA.....APPLICANT/CLAIMANT

VERSUS

KENYA NATIONAL PRIVATE

SECURITY WORKERS UNION (KNOSWU).....1ST RESPONDENT

ISAAC G.M. ANDABWA.....2ND RESPONDENT

JOASH ANDAWA SOITA.....3RD RESPONDENT

AND

KENYA NATIONAL PRIVATE SECURITY WORKERS

UNION, NAIROBI COUNTY BRANCH.....INTERESTED PARTY

RULING

1. The Application before Court is the one dated 11th July, 2018.

2. The Application was filed through a Notice of Motion filed under Section 3 & 12 of the ELRC Act 2014, Section 4 of the Fair Administrative Action act 2015, Rule 17 of the ELRC (Procedure) Rules, 2016, Sections 41, 43, 44, 45,46,49 & 50 of Employment Act, 2007 Articles 19, 20,21, 22, 23, 27, 28, 29(d) (f), 41, 43,47,50, 159, 258 & 259 of the Constitution of Kenya, 2010 and all other enabling provisions of the law.

3. The Applicant seeks the following Orders:-

1. THAT, this Application be certified urgent, service be dispensed with, and the same be heard on a priority basis.

2. THAT the Court be pleased to Order and direct the 1st Respondent to immediately pay the Applicant/Claimant his terminal benefits, underpayments of salaries and other entitlements due to the Applicant/Claimant during the contracted period between 15th July, 2011 to 31st March, 2016, an equivalent of KSHS. 617, 884.00.

3. THAT the Court to issue an Order, and is hereby issued against the 1st Respondent, directing it to immediately pay the Applicant Claimant a maximum of 12 Months' Salary being Compensation for unlawfully terminating his Employment Contract, contracted period between 15th July, 2011 to 31st March, 2016, an equivalent of KSHS. 630,000.00.

4. THAT the Honourable Court be pleased to issue an Order directing the 1st Respondent to pay interests at the Court rate, of the orders at prayer 2 & 3, from the date of termination of the said employment contract, being 31st March 2016 until it its full settlement.

5. THAT, any other order or relief the Honourable court may deem fit to grant for the ends of justice to meet.

6. THAT, the costs and incidentals of this application be provided for.

4. This Application is premised on the grounds that:-

a) The Applicant/Claimant was employed by the 1st Respondent vide a letter dated 14th July 2011, and this Contract of Employment was unfairly, unprocedurally and unlawfully ended by the 1st Respondent on 31st March 2016, when the Applicant/Claimant was re-engaged again in another appointment letter dated 1st April, 2016.

b) By the time the Grievant was signing a new contract, the 2nd Respondent promised him that he was to settle all the outstanding terminal benefits emanated from the Contract of Employment between 15th July, 2011, to 31st March, 2016, by the end of the month of April, 2016. This Promise and pledge has never been fulfilled even after the Second Employment Contract was again unfairly terminated on a letter dated, 30th October 2016, & 17th November 2016.

c) The 1st Respondent is unlawfully withholding the Grievant/Applicant/Claimant's terminal benefits and other unpaid salaries that which resulted from a Contract of Employment between 15th July 2011 to 31st March 2016.

d) The adverse action by the 1st, 2nd, & 3rd Respondents has since subjected the Applicant to severe economic challenges ever witnessed to the extent that the Applicant has since not been able to fulfil rental obligations for the last ten months or so, due to the refusal by the Respondents to effect payment of the Applicant/Claimant terminal benefits and other unpaid salaries due to the Applicant and which resulted from the employment contract between 15th July, 2011 to 31st March 2016, he is at the verge of being thrown out of his rental house, together with his family, and subjected to public ridicule, and suffer irreparable loss and damages.

e) In the month of July 2011, the Applicant/Claimant was offered an employment by the 1st Respondent vide an appointment letter / notice dated 14th July 2011, appointed as the 1st Respondent's Organizer, and attached to the Interested Party herein, effective from the 15th day of July 2011 with a consolidated salary of KSHS. 18,000.00.

f) In terms of the appointment letter notice dated 14th July 2011, Applicant/Claimant was obligated to perform activities such as membership mobilization, membership recruitment, membership sensitization among other activities. Pursuant to the said appointment letter/notice dated 14th July 2011, the Applicant/Claimant's employment was premised in contract term of six months, within which the same was to be either renewed or confirmed.

g) From 15th July 2011, the Applicant/Claimant embarked on delivering services under the terms and conditions contained in the appointment letter/notice dated 14th July 2011. The Applicant in all material times, and during the contractual period/in service, he discharged his duties diligently and with utmost good faith to the extent that even after the six months duration of service which was captured at the letter of appointment, he did not receive any communication from either the 1st Respondent or the 2nd Respondent regarding the said contract.

h) After the six months, the employment contract was not reviewed, it is presumed that the contract was confirmed anyway, as the Applicant/Claimant was still engaged to the 1st Respondent on position of organizer, and continued working uninterruptedly, discharging his duties diligently, as organizer of the 1st Respondent attached to the Interested Party.

i) On a letter/notice signed by the 2nd Respondent courtesy of the 1st Respondent and dated 20th January 2012, communicated the Applicant Salary increment from KSHS. 18,000.00 to KSHS. 20, 000.00, effective on 1st April, 2012. Since the 1st salary increment of 1st April 2012, the 1st Respondent in diverse dates and in various communications, it increased the Applicant / Claimant consolidated salary to KSHS. 35,000.00. The KSHS. 35, 000.00 was effective from 1st June, 2014.

j) On 5th April 2015, the Applicant/Claimant was transferred from the Interested Party to discharge duties at the 1st Respondent's Head Office and acting as the Industrial Relations Officer, but salary did not reflect the obligation, it remained KSHS. 35,000.00, which position was held up until 31st March 2016, when the Applicant was formally engaged vide a notice dated 1st April 2016. During this period in 5th April 2015 to 31st March 2016 did not take his annual leave for the year 2015.

k) This contract which started on 15th July, 2011, unfairly ended on 31st March 2016. On the 31st March 2016, the Applicant/Claimant was called to the 2nd Respondent office, verbally briefed by the 2nd Respondent that the 1st Respondent had terminated the contract between 15th July 2011 and 31st March 2016, and he will be paid all his benefits, including service at a rate of 30 days per every year worked, and he has since been offered a new contract.

l) The Communication made by the 2nd Respondent as captured at paragraph no. k above together with the cause of action which terminated the said contract did not adhere to the provisions of Sections 35, 36, 41, 42, 43, 44, 45 and 46 of the Employment Act 2007. The same action did not conform to the express provisions of Section 4 of the Fair Administrative Action Act, 2015.

m) During the entire period when the Applicant worked for the 1st Respondent as an organizer attached to the Interested Party, and as the Dispute Resolution Officer, and as the acting Industrial Relations officer between 14th July 2011 to 31st March 2016,

the contracted term, he discharged his duties diligently, and with utmost good faith, leaving behind a clean record to be admired.

n) By the time the Applicant's employment contract between 15th July 2011 to 31st March 2016, was frivolously, unfairly and unprocedurally terminated, by the 1st Respondent, and by the time the Applicant/Claimant was signing another new contract on 1st April 2016, his terminal benefits and other unpaid salaries which were dues, were tabulated as shown here below:-

i. One Month Notice Kshs. 52,500.00

ii. Leave earned and not taken Kshs. 52,500.00

iii. Acting Allowance, between 05.04.2015-31.03.2016; KSHS. 52 500.00 - 35000 =17 500.00 KSHS. 17 500.00 x12months Kshs. 210,000.00

iv. Service at 30 days per every completed year. 30 days x 52 500 x 5years = Kshs. 302,884.00

26 days

v. Fully Compensation for unfair termination of Employment Contract; (KSHS. 52 500.00 X 12 Months)

o) After the 1st Respondent terminated the employment contract of the Applicant/Claimant, between 15th July 2011 to 31st March 2016, the Applicant/ claimant was again re-engaged by the 1st Respondent vide an Appointment Letter/Notice dated 1st April 2016, as Industrial Relations Officer based at the 1st Respondent's Head Office, Nairobi, with a consolidated salary of KSHS. 52,500.00. The new appointment dated 1st April 2016 was effective same date. The Applicant accepted the new employment contract dated 1st April 2016 as was offered by the 1st Respondent, as he waited the payment of his terminal dues and benefits.

p) The 2nd Respondent kept promising the Applicant that he will be paid his terminal benefits whenever the Applicant enquired the same from the 2nd Respondent. The 2nd Respondent never kept the promise to actualize the payment of the Applicant terminal benefits, despite the fact that all those others who were also affected by the action of the 1st Respondent in terminating their employment contracts were already paid their terminal benefits.

q) The Applicant continued to discharge his duties diligently as he awaited the 1st Respondent to pay his terminal benefits of the first contract which ended on 31st March 2016. The Applicant continued discharging his duties diligently until the 2nd contract was summarily terminated vide a summary dismissal dated 24th October 2016, on allegations of gross misconduct. The summary dismissal was informed by malice as the Applicant never appeared before a properly constituted staff disciplinary committee to be heard.

r) The Applicant/Claimant successfully appealed against the Summarily Dismissal dated 24th October 2016, and thereafter given another appointment letter dated 10th November 2016. The new appointment was marred with mischief and conspiracy, since the reinstatement would have been the product of a successful appeal and not another appointment. The Applicant/ Claimant's appeal successfully overturned the said cause of action dated 24th October 2016.

s) When the Applicant/Claimant learned the mischief of the 1st Respondent in reducing his salary without any justification, he wrote a letter dated 10th November, 2016 and expressed his dissatisfaction to the new offer, bearing in mind that he appealed against the cause of action dated 30th October, 2016, which appeal was successful, as the cause of action dated 24th October, 2016, was just an excuse to get rid of the Applicant/Claimant, as the alleged matter had since been solved.

t) The Applicant/Claimant in his letter dated 10th November 2016, he informed the 1st Respondent that instead of reducing and slashing his salary downwards, he should be paid his terminal benefits of the employment contract between 15th July, 2011 and 31st March, 2016 and proceed to other life. On a letter dated 17th November 2016, the 1st Respondent vide the 2nd Respondent rebutted Applicant/ Claimant letter and where it purportedly upheld the cause of action dated 24th October 2016, but refused to pay the Applicant his terminal benefits of the earlier contract.

u) It is trite law that once a decision has been overturned for whatever reasons vide an appeal, it cannot be upheld, as there is nothing remained to uphold. It is important to note that once a decision was arrived at, and that the Applicant/Claimant appeal was successful, then the summary dismissal of 24th October 2016, was technically vacated and set aside, and there was nothing remained to be upheld.

v) It is also a settled law that employment contracts do not marry, and do not run concurrently. One contract must end to pave way for another contract. The contract of employment between 15th July 2011 and 31st March 2016 has no dispute whatsoever, however, it was controversially, unprocedurally, unfairly and unlawfully initiated and executed.

w) The Applicant's several efforts and attempts to follow up his terminal benefits emanated from the contract between 15th July, 2011 to 31st March, 2016 have not yielded any fruit. The 1st & 2nd Respondents have failed, neglected and ignored and refused to pay the Applicant/Claimant his terminal benefits due to him despite the fact that there is no dispute over the said employment contract.

x) *The Applicant wrote letters reminding the 1st Respondent of his terminal benefits which are due, and resulted from an employment contract which was just terminated by itself and replaced by another contract. The 2nd Respondent despite service has neglected, ignored, failed or refused to reply. The 2nd Respondent actions are contrary to articles 27, 28, 41, 47 and 50 of the constitution of Kenya 2010. The Actions amounts to bad Labour practice and this Court must find so.*

y) *The actions of the 1st & 2nd Respondents of unlawfully withholding the undisputed terminal benefits of the Applicant negates the provisions of Section 4 of Fair Administrative Action Act, 2015, the actions also breaches "PART IV - PROTECTION OF WAGE" Sections 17-19 of the Employment Act 2007. It is important for the Honourable Court to note that the 1st Respondent is a Trade union which agitates for workers' rights, it must not be allowed to abuse the employment and labour rights of its own former employee, the Applicant/Claimant herein.*

z) *The Applicant has properly invoked the jurisdiction of this Court, and has come to Court in good time, without unnecessary, or undue delay, and presented a prima facie case, and chances of success tilts towards the Applicant/Claimant.*

aa) *The Applicant deserves the Orders sought, and the Honourable Court be pleased to allow the Application in its entirety, to promote the rule of law, equity, fairness and justice, defeat discrimination and unfair labour practices and fair administration of Justice for the Applicant/Claimant, as the withholding of his terminal benefits is unlawful, unfair and unprocedural, adverse actions which amount to impunity. It is the Applicant believe that this Honourable Court has a constitutional duty and mandate to protect the Claimant, and whose livelihood is at risk, and threatened by the adverse actions of the 1st & 2nd Respondents.*

bb) *The Honourable Court has an obligation to evaluate and consider the Applicant's Application, and to grant the Orders sought as the Respondents will suffer no prejudice by paying the Applicant's terminal benefits due to him.*

cc) *If the Honourable Court declines to grant the Orders sought then the Applicant's human dignity will be severely eroded , his public life will be subjected to ridicule, misery, mental/psychological torture, physical- trauma and will be practically suffer irreparable loss and damages, his constitutional and labour rights brutally abused by the 1st & 2nd Respondents herein.*

5. The Application is supported by the Affidavit of **JAIRUS KATERE SHIAMALA** sworn on 11th July, 2018 in which he reiterates the averments made in the Notice of Motion Application.

6. The 1st, 2nd, 3rd Respondents and the Interested Party opposed this Application and they filed a Replying Affidavit sworn on 23rd July, 2018 by **ISAAC G. M. ANDABWA**, the National General Secretary of the 1st Respondent herein. They aver that the Orders sought by the Claimant/Applicant are substantive in nature and is contrary to the principle in **Olive Mwihaki Mugenda & Another v Okiya Omutata Okoiti & 4 Others (2016) eKLR** and ought not to be granted on interlocutory Application. Further, the 1st, 2nd, 3rd Respondents and the Interested Party filed Grounds of Opposition dated and filed on 20th July, 2018.

7. The grounds of opposition are as follows:-

1. The Application is misplaced, incompetent and misconceived.

2. The prayers sought are substantive/final in nature and cannot be granted on interlocutory application

3. No urgency has been established.

8. The Claimant/Applicant filed a further Affidavit sworn by **JAIRUS G.M. ANDABWA** on 10th September, 2018 and Notice of Preliminary Objection dated 20th September, 2018 and filed in Court on 24th September, 2018.

9. The Claimant/Applicant has raised a Preliminary Objection against the Respondents' Replying Affidavit on a point of law on account that it is incompetent and incurably defective. They also aver that all the annexures in support of the averments thereto, are incompetent, ineffective and invalid to be relied as they are not complaint with Rule 9 of the Oaths and Statutory Declaration Rules.

10. The Claimant/Applicant further avers in his Preliminary Objection that the averments in paragraphs number 5, 6, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 28, 29 and 32 as hinged to the incompetent, invalid and defective annexures, are also valueless in opposing the instant Application and are filed contrary to Rule 9 of the Oaths and Statutory Declaration Rules. Further, that the Replying Affidavit dated 11th July 2018 opposing the Application is bad in law, vexatious, incompetent, defective and an abuse to the Court process.

11. In disposing of the instant Application, the parties agreed to file written submissions.

Claimant/Applicant's Submissions

12. The Claimant/Applicant in his submissions urged the Court to allow the instant Application as it will not prejudice, or/and compromise the main claim, as what is sought is not final as alleged by the Respondents. He further submits that the grant of the reliefs sought will only promote fairness and justice to the Applicant pursuant to the provisions of Article 159 of the Constitution of Kenya, read together with the provisions of Section 3 and 12 of the Employment & Labour Relations Court Act, 2014.

13. The Claimant/Applicant urges this Court to allow his Application as prayed.

Respondents' and Interested Party's Submissions.

14. It is submitted by the Respondents' that the Orders sought by the Claimant/Applicant in the instant Application are final Orders which can only be granted by the Court after hearing of both parties.

15. The Respondents' further submit that the principles for granting final Orders at the interlocutory stage are set out in the case of **Olive Mwhaki Mugenda –vs- Okiya Omtata Okoiti & 4 Others (2016) eKLR** in which it was stated that this can only be done in exceptional circumstances when the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such relief. The reason for granting such orders must be stated. Court can only grant such orders if failure to do so would prick the conscience of the Court resulting in injustice being perpetrated through the hearing and at the end the Court would not be able to vindicate the cause of justice.

16. The Respondents further relied on the case of **Kenya Airways Company Limited –vs- Joseph Otieno & 14 Others (2018) eKLR**, which provides that issuance of a mandatory injunction at an interlocutory stage without according both parties audience illustrates that special circumstances have not been met.

17. The Respondents submitted that the Claimant/Applicant has not demonstrated and/or satisfied any of the principles set out in the above cases and as such the Application dated 11th July, 2018, ought to be dismissed with costs.

18. I have examined the averments of both parties. I do find that the orders being sought in this application are similar to those sought in the main claim where the Claimant states that the issues on the claim relate to the withholding of his terminal benefits in the contract between 15th July 2011 and 31st March 2016 and unlawful and unfair termination of employment.

19. The orders sought are therefore final orders as stated in the case of **Olive Mugenda vs Okiya Omtata Okoiti and 4 others (Eklr) 2014** above.

20. There is no imminent injustice that will result to the Applicant if the orders sought are not granted. I therefore decline to grant orders sought and dismiss this application accordingly. I order the main claim to proceed for hearing.

21. Costs of this application to be in the cause.

Dated and delivered in open Court this **11th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ayako holding brief for Wati for Respondent – Present

Applicant – Absent