



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
PETITION NO. 92 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 25th January, 2017)

NICHOLAS BISHOP.....APPLICANT/PETITIONER

VERSUS

AAR HEALTHCARE HOLDINGS LIMITED.....RESPONDENT

RULING

1. The Application before the Court is dated 20.7.2016 filed in Court on the same day brought under Section 5(1) of the Judicature Act incorporating Order 52 Rule 3 of the Rules of the Supreme Court of England and Wales as modified by the Civil Procedure (Amendment No. 2) Rules, 2012 (Rule 81.4 of Part 8 thereof) where the Applicant seeks for Orders:

1. That personal service of this application notice upon the Contemnors be dispensed with and the application notice, in so far as the same is to be served on the Contemnors (the Directors of AAR Healthcare Holdings Limited), be instead served on the firm of Mboya Wangong'u & Waiyaki Advocates, who are on record for AAR Healthcare Holdings Limited, the Respondent in the Petition.

2. That the Directors of the Respondent herein namely, Maryjka Gabriella Beckmann, Pieter Zujidgeest and Marten Joost Otto Coppoolsebe committed to civil jail for a period of six (6) months each and/or until further Orders of this Honourable Court.

3. The Respondent be fined such amount as this Honourable Court shall deem fit and its property in Kenya be attached and sold to the satisfaction of such fine should the same not be paid by the Respondent within fourteen (14) days of such Order for payment.

4. The Contemnors do purge their contempt by directing their servants/employees and/or agents be forthwith restrained from terminating or altering the terms of the Petitioner's employment and that the Contemnors pay the Petitioner all his salaries, benefits and allowances pending the interpartes hearing and determination of the application for conservatory Orders.

5. That the Honourable Court be pleased to make any other Order as the Justice of this case may demand.

6. That cost of the Application Notice be awarded to the Applicant.

2. The Application is based on the grounds that:

1. By an Order given on 22nd June, 2016, (the Order) , and issued on the same date, this Honourable Court issued the following Orders:

a. This application be and is hereby certified as urgent, be heard ex parte in the first instance and service be dispensed with at the first instance;

b. Conservatory Orders be and is hereby issued restraining the Respondent, its agents, employees and/or servants from terminating or altering the terms of his employment as the Group Chief Financial Officer of the Respondent pending the interpartes hearing and determination of the Application;

c. Conservatory Orders be and is hereby issued restraining the Respondent, its agent, employees and/or servants from termination or altering the terms of his employment as the Group Chief Financial Officer of the Respondent pending the interpartes hearing and determination of the application;

d. An Order be and is hereby issued that the payment by the Respondent of all the Applicants'/Petitioners' salaries, benefits and allowances due on the month of April (April was paid), May and June 2017 and that the said payments be maintained pending the inter partes hearing and determination of this application.

e. The Application be served upon the Respondent for the hearing on 6th July, 2016.

2. On 4th July, 2016, in blatant breach of the Order, the Respondents in this application allowed and/or directed their employees, servants, contractors and/or agents, African Management Services Company (AMSCO) to pay the Petitioner payment in lieu of notice of termination in the amount of EUR 26,228.19 (twenty six thousand, two hundred and twenty eight Euros and nineteen cents) which actions constitute attempts to terminate and alter the terms of the Applicant's employment as the Group Chief Financial Officer of the Respondent. The Respondent, its employees, servants, contractors and/or agents, have also breached the Order by failing to pay the Petitioner all his salaries, benefits and allowances for the months of May, June and July pending the inter partes hearing and determination of the application for conservatory orders.

3. In Particular, the unpaid salaries, benefits and allowances for the months of May and June 2016 include car, housing and security allowances which the Respondent is required to pay on a monthly basis in accordance with the Employment Contract dated 11.1.2015.

4. The Honourable Court has the Power under Article 22 and 162(3) of the Constitution of Kenya, 2010 to issue the conservatory Orders it gave on 22nd June, 2016, and under Section 5 of the Judicature Act, Cap 8, Laws of Kenya to punish the Respondents for the disobedience therefore.

5. It is in the interest of justice for this Honourable Court to punish the Respondent accordingly for disobeying the direct and unambiguous order of this Honourable Court which they were well aware of so as to uphold the rule of law.

3. In support of the application the Applicant has filed a supporting affidavit sworn by one Nicholas Bishop wherein he states that the Order stated hereinabove was served on the firm of Anjarwalla & Khanna at 4.05 p.m. with an original copy of the Order making it clear that the Respondent has the obligation to ensure that the Order is obeyed and that he ensures that the Respondent, or its agents, servants or employees, attend Court on the 6th day of July, 2016.

4. They further state that on 4th July, 2016, in blatant breach of the Order, which they state the Respondents were aware of paid the Applicant notice pay of EUR 26,228.19 but failed to pay all his salaries, benefits and allowances as ordered by the Court.

5. The Applicant seeks this Court's intervention to purge the alleged contempt of Court to safeguard the rule of law and the dignity of the Court.

6. In opposition of the Application the Respondent have filed grounds of opposition and a Replying Affidavit sworn by one Jagi Gakunju the Group Chief Executive Officer wherein they state that the Orders served did not contain a penal notice which orders were subsequently amended to include one.

7. They admit service of the Order but state that the Orders were erroneous as they were based on the assumption that the Applicant was an employee of the Respondent and that the Applicant did not disclose to the Court material facts which would have affected the decision of the Court to wit:

a. That the Petitioner has no current or operative contract of employment with the Respondent at the time;

b. That the petitioner did not hold a Kenyan work permit which could conceivably enable him to be employed by the respondent herein at any material time;

c. That the petitioner had a Maximum Duration Agreement with African Management Services Company (AMSCO) and that AMSCO is the one that paid him his monthly payments;

d. The true nature of the Petitioner's relationship with the Respondent (which was not an employment contract) and with AMSCO and that in fact he was not in any salaried employment whatsoever;

e. That in fact the Petitioner's arrangement with AMSCO had been terminated by letter dated 4th May, 2016, one and a half months before he went to Court and that AMSCO had quantified his final dues at US \$ 26,228.19 which have since been paid by AMSCO.

8. The Respondent are of the view that the aforestated information would only have come to the fore at the interpartes stage which the Applicant has failed to set a date for which in their opinion is an attempt to hide the truth from the Court.

9. The Respondent state that they have complied with the Court's Orders to the fullest extent possible by not altering the terms of employment because none exists and none existed as at the time of the Orders were issued and served.

10. They also state that they have not subjected the Petitioner to any cruel, inhumane or degrading treatment or discrimination and unfair labour practices in particular subjecting the Petitioner to blood urine tests. It is the Respondent's contention that no payments were made to the Applicant as none were due.

11. That the contempt of Court complained of and detailed in paragraph 3 of the Petitioner's affidavit dated 12th July, 2016, are misleading because the alleged breach was committed by AMSCO who is not under the control of the Respondent. That the said payments complained of were termination dues for the Maximum Duration Agreement which the Respondent is not party to as it had already terminated its relationship with AMSCO on 4th May, 2016.

12. That the Orders issued are incapable of performance since the Applicant was not an employee of the Respondent. The Respondent state that they never paid any salary to the Applicant but paid a management fee to AMSCO under a Management Training Agreement dated 17th April, 2016, where the services of the Applicant were made available to the Respondent. The Respondent pray for the Orders of

22nd June, 2016, to be discharged.

13. In determining this application, this Court will consider:

- 1. Whether there was an employment relationship between the Applicant and the Contemnors.**
- 2. If yes, whether the alleged Contemnors did any act or omission in disregard to this Court's order dated.....**
- 3. What order to grant in the circumstances.**

14. On 1st issue, the Claimant was served with an appointment letter on 11.1.2015 signed by the Respondent Group Managing Director. The appointment letter stated that the Claimant had been appointed as Group Chief Finance Officer (GCFO) AAR Health Care Holdings Limited (AAR) with effect from 1.3.2015 and would be reporting to the General Managing Director.

15. This contract was to run for 3 years upto 28th February 2018 or any other date that was to be agreed upon between Claimant and AAR. This contract also stated as follows:

"1.3 Work Permit:- The contract will be put under the African Management Services Company (AMSCO) and therefore the Company will pay a fee to AMSCO covering AMSCO's services. Your employment will be subject to the company obtaining a work permit for you in Kenya".

16. Clause 2.7 Termination of Employment states as follows:

(i) "The Contract can be cancelled if it is decided you are not performing up to standards for a CFO at a CFO level, in that case a notice period of four months will be applicable. This decision will be made by the General Managing Director supported by the Remuneration and HR Committee (which consists of two board members).

(ii) By AAR giving the employee four (4) calendar months' notice in writing of intention to terminate employment or payment of four (4) calendar months' salary in lieu by AAR.

(iii) You may resign this office upon giving AAR four (4) calendar months' notice in writing of the desire to do so.

(iv) By AAR at any time and without notice or payment in lieu of notice if:

a) During working hours you are intoxicated, you render yourself unwilling or incapable to perform your work properly

-----".

17. At Clause 2.8 Arbitration, the appointment letter provided as follows:

"If any dispute arises out of this contract of employment, the parties will first attempt to settle it by mediation. If the dispute is not settled by mediation it shall be referred to arbitration by a single arbitrator appointed jointly by the parties-----".

18. My reading of this appointment letter indicate that there was an employment relationship between Claimant and Respondent and this was also communicated to all staff of the Respondent under the Memo dated 20th March 2015.

19. Despite the Respondent insisting that they never employed the Applicant, this appointment letter points to the contrary.

20. The Respondents have averred that this letter of appointment was abandoned as they have stated in their replying affidavit at paragraph 14 & 15 & 16. Their paragraph 14, 15 and 16 of the replying affidavit state that the contempt was committed by AMSCO who was not acting as Respondent's agent, employee or servant in making the alleged payment and that the Respondent had terminated its agreement with AMSCO on 4-5-2016. The Agreement between AMSCO and Respondent is dated 20.4.2015 but the Applicant was employed on 11.1.2015 and was not a party to the agreement between Respondent and AMSCO.

21. Despite the fact that the Respondents aver that AMSCO did not act as their agent, Appendix JG 8 of Respondent's documents state as follows:

“This letter serves to confirm that on 28th April 2016, the Client Company instructed AMSCO to remove the AMSCO Manager from assignment thereto. Accordingly, the AMSCO Manager's assignment shall terminate with effect from 31st July 2016, but as requested by the Client Company, the AMSCO Manager is released from service with immediate effect”.

22. This Court issued order on 22.6.2016 in terms of prayer 1, 2, 3 and 4 which orders were as follows:

1. “That the application be and hereby certified as urgent, be heard ex parte in the first instance and service of the same be dispensed with at the first instance;

2. That conservatory orders be and is hereby issued restraining the Respondent, its agents, employees and/or servants from terminating or altering the terms of his employment as the General Chief Financial Officer of the Respondent pending interpartes hearing of this application;

3. That conservatory orders be and are hereby issued restraining the Respondents, its agents, employees and/or servants from subjecting the Applicant/Petitioner to further cruel, inhumane or degrading treatment, discrimination and unfair labour practices including subjecting the Applicant/Petitioner to any further blood and urine tests pending the interpartes hearing and determination of this application.

4. That an order be and is hereby issued that the payment by the Respondent of all the Applicants'/Petitioners' salaries, benefits and allowances due on the month of April (April was paid) May and June 2016 and that the said payments be maintained pending the interpartes hearing and determination of this application -----“.

23. This order was served upon the Respondents and the Appellants aver that this is evidenced by the Respondents Advocates proceeding to file a Notice of Preliminary Objection, grounds of Opposition and Replying Affidavit all dated 6.7.2016 in preparation of the scheduled hearing on 6.7.2016.

24. The Respondents have submitted that though the order was served upon the Respondents, the order came abut too late as payments in the Application were made on 4.7.2016 and the orders were served upon them on 12.7.2016.

25. I note that indeed the Respondents were served with the orders of this Court but on 13.7.2016 which was after the date of not altering the terms of the contract between the Applicant and Respondent and for this reason it can be seen that the Respondents breached the terms of the contract but were not in deliberate contempt of Court.

26. This being the case, this Court will not find it appropriate to find the Respondents Contemnors guilty of contempt. However, the rest of the breaches alleged can be articulated in the main claim.

Read in open Court this 25th day of January, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wairoto for Petitioner – Present

Waiyaki for Respondent - Present