



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 153 OF 2015

IN THE MATTER OF AN APPLICATION FOR REVIEW

THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA).....APPLICANT

DR. JOHN MURIITHI.....1ST CLAIMANT

JACKSON AWOUR.....2ND CLAIMANT

JOICE ONYANGO.....3RD CLAIMANT

JUDY OBURA.....4TH CLAIMANT

(CONSOLIDATED WITH CAUSE NOS. 212 AND 241 OF 2015)

JAMES MUTISO KALOKI.....1ST CLAIMANT

SUSAN KAGENDO KARANJA.....2ND CLAIMANT

JACKSON NGUNJIRI GATHOGO.....3RD CLAIMANT

ALICE WAMBUI NJAMBI.....4TH CLAIMANT

AND

THE BOARD OF TRUSTEES THE MATER HOSPITAL.....RESPONDENT

AND

LAWRENCE GICAGA MUIGA.....CLAIMANT

AND

THE BOARD OF TRUSTEES THE MATER HOSPITAL.....RESPONDENT

RULING

1. The applicant herein via an application dated 5th April, 2016 seeks an order for review or

discharge of the order issued by this Court on 10th July, 2015.

2. The orders sought to be reviewed and or discharged concerned interdiction of the respondent/applicant by this Court from terminating the services of the claimants pending the hearing and determination of the suit herein. The applicant further sought review or vacation of the order concerning prohibition from advertising and substantive filling of positions left vacant by the claimants pending the hearing and determination of the suit. The applicant further sought review of the order concerning payment of half salary with effect from 4th February, 2015 pending the hearing and determination of the suit.

3. The application was based on the grounds that the impact and effect of the orders of the court was to grant an order of reinstatement which was in effect an order of specific performance of a contract for personal service. The applicant further contended that the effect of the orders of the court was an abrogation of the respondent's right to terminate services of its employees for a just cause under sections 41, 43 and 44 of the Employment Act. The applicant further complained that the effect of the orders of the Court usurped the respondent's managerial prerogative to manage its business with regard to its personnel and compelling payment of half salary without consideration was of grave prejudice to the applicant.

4. According to the applicant, the business of providing medical services to patients require utmost personnel. The applicant has therefore been hamstrung in management of the Hospital by the Court's order requiring it to employ persons in acting capacities with respect to nine senior management officers. This according to the applicant has undermined accountability, confidentiality and effective management of the Hospital.

5. The applicant further stated that four of the claimants namely Dr. John Muriithi, Jackson Gathogo, Jackson Odera Awuor and Susan Kagendo Karanja had obtained alternative employment. Further that Lawrence Muiga had omitted to disclose that his contract expired on 31st May, 2015.

6. The claimants on the other hand through one Joyce Onyango contented that whereas the Court has jurisdiction to review its orders, the same can only be done under very clear circumstances stipulated by law.

7. According to the claimants the application does not meet the threshold for the exercise of the Courts jurisdiction to review its orders. The application according to the claimants, is a crafty attempt to have the Court sit on appeal on its own orders and findings. The application did not disclose any new or important matter of evidence discovered after the exercise of due diligence. Further the applicant did not contend that the ruling or order was initiated by mistake or error apparent on the face of the record or the ruling is in breach of any written law.

8. Rule 33 of the rules of this Court make provisions regarding review. The rule stipulates the circumstances under which the court can review its order of most relevance to this matter is rule 33(1) (a) (b) and (d).

9. Under sub rule 1(a) a review can be made if there is discovery of new and important matter or evidence which after exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made.

10. Under sub rule 1(b) a review can be made on account of some mistake or error apparent on the face of the record and under sub rule 1(d) a review can be made for any other sufficient reasons.

11. The applicant before me complains that the orders of this Court made on 10th July, 2015 amounted to reinstatement hence an order for specific performance of a contract for personal service. The

applicant further complained that the said order had the effect of interfering with managerial prerogative of the applicant to manage its business. Stopping here for a moment, the view that the orders of the Court were tantamount to an order of reinstatement hence an order for specific performance of contract for personal service is just a view. It cannot be said to be a new matter which was not in the knowledge of the applicant when the suit was filed. In any event its more of a legal question but does it amount to an error or mistake apparent on the face of the record to fit under rule 33(1) (b)? The Court's answer is in the negative. This ground of complaint is a subject matter of appeal and cannot be a ground for review.

12. The applicant has however put forward a valid concern that most of the claimants have since the making of the order of the Court obtained employment elsewhere and further that Lawrence Muiga's contract expired on 31st May, 2015. The foregoing information cannot be said to have been within the knowledge of the applicant when the orders were made besides they constitute sufficient grounds for a review or variation of the order of the Court. Taking up employment elsewhere technically terminated the claimants' contracts with the applicant. It would therefore be legally untenable to hold the applicant to terms of a contract the claimants' by their own action have terminated.

13. In its ruling delivered on 10th July, 2015 the Court order at paragraph 34 as follows:-

“The foregoing have been said, this Court makes the following orders in respect of the applications dated 18th and 24th February, 2015.

(a) the respondent by itself, servant, agents or howsoever acting is hereby restrained from terminating the claimants' services pending the hearing and determination of the suit herein.

(b) the respondent shall not advertise and or substantively fill the positions left vacant by the claimants pending the hearing and determination of the suit herein.

(c) under escort of respondent's security and personnel responsible, the claimants where applicable shall be allowed access to their offices or places of work to collect their personal belongings.

(d) the claimants' suspension shall remain in force but on half salary with effect from 4th February, 2015 pending the hearing and determination of the suit herein.

(f) parties herein will go through pretrial procedures within 60 days of this Ruling.

(g) this matter will be mentioned on 24th September, 2015 for directions on hearing of the main claim.

(h) Costs in the cause.”

14. The above orders were made bearing in mind the urgency of the matter. The Court had contemplated the matter would be heard in the shortest time possible. This never happened. In view of the foregoing developments, it would be unconscionable to leave the orders made on 10th July, 2015 intact. To that extent, the Court vacates order (a) (b) and (d) of the ruling delivered on 10th July, 2015.

15. The parties shall proceed to set the suits down for hearing on merits at the Registry.

16. It is so ordered.

Dated at Nairobi this 3rd day of February 2017

Abuodha Jorum Nelson

Judge

Delivered this 3rd day of February 2017

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge