



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.2172 OF 2016

EDEN ROBINSON ODHIAMBO.....CLAIMANT

VERSUS

BOARD OF TRUSTEES TOURISM FUND.....RESPONDENT

RULING

1. The Respondent, Board of Trustees Tourism Fund by application and Notice of Motion filed under the provisions of section 1A, 1B, 3A of the Civil Procedure Act and Rule 16(1) of the Industrial Court (Procedure) Rules [Employment and Labour Relations Court (Procedure) Rules, 2016] filed on 2nd December, 2016 and seeking for orders that;

The claimant's Statement of Claim and the accompanying Notice of Motion application both dated 24th October 2016 be dismissed and or struck out.

The court orders issued ex parte on 24th October, 2016 be hereby set aside.

Costs be borne by the claimant.

2. The application is supported by the annexed affidavit of Joseph Cherutoi and on the grounds that the matters in issue are also directly and substantially in issue in Petition No.100 of 2015 between the same parties and which suit is pending in this court. The claim is incompetent, frivolous and an abuse of the court process. That the Claimant misrepresented and or omitted material facts in order to mislead the court to issue the orders *ex parte* on 24th October, 2016. The grant of orders sought by the Respondent will save court time and avoid embarrassment.

3. Mr Cherutoi also avers that as the Chief Executive officer of the Respondent he has authority to reply support the application herein. The Respondent as a body established under statute and the Tourism Act has a primary mandate to manage the Tourism Fund. On 2nd October, 2012 the Claimant with 6 others were charged with the offence of failure to comply with the law relating to Procurement contrary to section 45(2) read together with section 48 of the Anti-Corruption and Economic Crimes Act. Due to the seriousness of the offence the Claimant was suspended from duty. On 15th December, 2015 the Claimant filed Petition No.100 of 2015 seeking;

a. Declaration that the petitioner's suspension by the Respondent determined and stood lifted at the expiry of twenty four (24) months of the petitioner being charged on 4th October 2012 lifted by virtue of section 62(1) of the Anti-Corruption and Economic Crimes Act, 2003 and any further

suspension be and is hereby declared illegal.

b. A declaration that the petitioner ought and should be reinstated and allowances effect to full service as the respondent's Head of Levy Operations.

c. Any order directing the Respondent to release all and any salaries and allowances due to the petitioners and withheld by the Respondent by virtue of the suspension now determined and lifted by the operation of the law.

d. An order that the respondent's actions toward the petitioner have been in gross breach of the petitioner's fundamental rights and freedoms.

e. General damages for unlawful suspension.

4. Together with the petition the Claimant filed a Notice of Motion application and seeking orders that;

Pending hearing and determination of the instant petition this court be and is hereby pleased to issue a declaration that the petitioner's suspension from service by the Respondent at half pay be and is hereby determined and stands lifted with immediate effect and the petitioner be and is hereby reinstated to full service of the Respondent forthwith.

Pending the hearing and determination of the instant petition this court be and hereby pleased to issue and order directing the Respondent to release all and any salaries and allowances due to the petitioner and withheld by the Respondent by virtue of the suspension now hereby declared determined and lifted.

5. Mr Cherutoi also avers that the matter in Petition No. 100 of 2015 came for hearing on 3rd February, 2016 and where the petitioner was absent and in the presence of the Respondent advocates the court ordered and directed that;

a. That due to the absence of the petitioner the same be and is hereby stood over generally.

b. That the 400/- court adjournment fee plus 2500/- costs to Respondent be paid forthwith.

c. That no step to be taken before the payment of adjournment fees and costs for today.

6. The Claimant has not taken any action in compliance with the orders of the court and instead has herby moved the same court by way of another suit and seeking for orders that;

A declaration that the purported offer of the claimant's employment to the public and attempted substitution before the completion of the anti-corruption case against him amounts to constructive termination is unfair, unlawful and a breach of his legitimate expectation

A declaration that the Claimant is entitled to be restored to his position as head of Levy Operations subject to the outcome of the case against him.

7. The case herein is similar to the cause of action in petition No.100 of 2015. The Claimant has misrepresented and omitted material facts in a quest to hoodwink the court to issue orders against the Respondent which orders were declined in Petition No.100 of 2015. The orders of 24th October, 2016 should be set aside.

8. In reply the Claimant filed his Replying Affidavit and avers that there is no Petition No.2127 of 2016 between the parties but Cause No.2127 of 2016. The respondents are in abuse of the court process as they have failed to file a reply to the application of 24th October, 2016 and instead filed a new application. Cause No.2127 is about the constructive dismissal by advertisement of the claimant's position when an

anti-corruption case is pending determination and the Claimant is on suspension. The reliefs sought under this cause are not similar to remedies sought in Petition No.100 of 2015.

9. Both parties filed their written submissions.

10. The Respondent as the applicant herein submits that the cause herein and the petition filed by the Claimant, Petition No.100 of 2015 raise substantially and directly the same between the same parties. The Claimant in reply has asserted that he has filed a Petition and a Cause which are different and seeking different and separate orders and which is contrary to principles set out in **Agricultural Finance Corporation versus Consolidated Insurance Brokers Limited and another [2014] eKLR**. In this case, the matters set out between the parties are similar and the same as in Petition No.100 of 2015. The Claimant is simply engaged in forum shopping with the sole purpose of obtaining orders without disclosing material facts. The court granted *ex parte* orders to the Claimant without knowledge of matters existing in Petition. No.100 of 2015 and as a result the Claimant is enjoying orders he was not able to obtain when he moved court in the other matter. He used deception and the orders should be vacated as held in **Republic versus National Transport & Safety Authority & 10 others ex parte James Maina Mugo [2015] eKLR**. The non-disclosure of material facts so as to obtain *ex parte* orders is an abuse of the court process and the Claimant should suffer the consequence of the orders he obtained being set aside.

11. The Claimant submits that the suit herein is not *res judicata*. The principles are set out in **E. T. versus Attorney General & Another [2012] eKLR**. That in **Elias Mudaki versus the Principal Secretary, Ministry of Tourism & 2 Others [2013] eKLR**, the Claimant had filed CMCC No.2648 of 2006 which was fully heard and judgement rendered. The Claimant therein filed a suit with the court over a different prayer and the court allowed the same. In Petition No.100 of 2015 the suit is not yet determined and the orders sought are different from this cause. This suit is a new matter that address facts that were not in existence before.

Determination

12. The Claimant does not deny that there exists Petition No.100 of 2015 between him and the respondent. The Petition relates to his suspension from duty upon being charged over corruption and anti-economic charges. Also the Claimant does not deny that his suit with the Respondent on his suspension was filed with this court and directions given. Further, the Respondent has advertised for his position while he is on suspension and thus seek to stop the same and moved court on 24th October, 2016 and obtained orders stopping the Respondent from recruiting and or replacing the position held by the claimant.

13. The orders of 24th October, 2016 are challenged by the Respondent in that they were obtained without the Claimant disclosing that there exists another suit filed in Petition No.100 of 2015 and while the same is pending he filed this cause and that the orders of 24th October, 2016 should be thus set aside as they were obtained disclosing material facts and thus in abuse of the court process.

14. Section 3 of the Employment and Labour Relations Court Act read together with Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 have given parties the flexibility to file suit thus;

7. (1) A party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.

(2) A person who wishes to institute judicial review proceedings shall do so in accordance with section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or

other suit filed before the Court.

15. In my view, it is not the *petition* or the *Cause* that should be in issue; rather it is the nature of orders sought by a litigant. Even where a matter is framed as a Memorandum of Claim or Cause and the Claimant proceeds to seek declarations of the nature that are constitutional, the Rules have permitted these procedures. This is to ensure parties before the court are able to get substantive justice without undue regard to technicalities but acknowledging that Rules of the court exist to guide parties and give the advance party a fair chance to be able to reply to filed and served pleadings.

16. I have recalled file and Petition No.100 of 2015, indeed as submitted by the Respondent, the Petition therein involves the parties herein and the basis of the same is that the Claimant as the employee of the Respondent was charged before Milimani Ant-corruption Case on 4th October, 2012 which matter is pending in court and as a result was suspended by the respondent.

17. In this suit, the Memorandum of Claim filed on 24th October, 2016 is on the basis that the Claimant as the employee of the Respondent was in 2012 charged under the Ethics and Anticorruption and Economic Crimes Act and by application of section 62 of the Act, the Respondent suspended him from duty. The case is on-going but the Claimant has proceeded to advertise for the position held by the Claimant through public notice. Such action of the Respondent is challenged as being in breach of the claimant's rights and taken to be constructive dismissal.

18. Rule 6 of the Court Rules allow parties to amend their pleadings

(6) A party may amend pleadings before service or before the close of pleadings:

Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.

19. The series of events leading to Petition No.100 of 2015 and the nature of orders sought relate to the suspension of the claimant. In the petition, the court has already given clear direction to the parties. The suit herein forms part of the series in Petition No.100 of 2015 as to divorce the same would be to lose sight of the cause of action herein. The Claimant cannot separate and seek to contradistinguish his petition with this cause and file a new and different suit without disclosing the other suit. To do so would be to defeat the purpose of Rule 6 and good order in the court addressing suits as filed between the same parties over the series of events.

20. Where the Claimant is aggrieved by the actions and conduct of the Respondent is advertising for his position, nothing stopped him on 24th October, 2016 from filing his application under Petition No.100 of 2015 and also amending the main Petition to include the new and relevant facts that arose as of such date. To file a new suit and seek constructive dismissal without bringing to the attention of the court the fact of the other suit where the Claimant had been suspended and seeking damages would be to engage in multiplicity of suits and an abuse of the court process.

21. The Claimant has relied on the case of **Elias Mudaki versus the Principal Secretary, Ministry of Tourism & 2 Others [2013] eKLR**, and the submissions that the court allowed a new suit over a new matter. However, the court in analysing the issues established that in CMCC No.2648 of 2006 judgement had been entered and thus there was a conclusion of the same when the new suit was filed with the court. In any event the suit that had judgment was filed with the lower court and has no similar jurisdiction with the court herein. To equate proceedings before the lower court and this court would be misleading. The procedures application in filing pleadings in 2006 when CMCC No.2648 of 2006 was filed are fundamentally different and regulated under a different regime of Rules from today.

22. The Claimant has not made any effort to state why he has not moved the court in Petition No.100 of 2015. Under such suit, I find sufficient forum under which the Claimant can address all issues between him the Respondent including the new matter of alleged constructive dismissal instead of filing new suit

such as this one for the court to address the question of constructive dismissal without putting into account the series of events leading to the allegation.

23. The assertion by the Claimant that the Respondent ought to have replied to his application of 24th October, 2016 instead of filing the current application is to miss the gist and import of the content and context of the application by the respondent. One of the known grounds for discharging an *ex parte* order is concealment of material facts or material non-disclosure. In the case of **The King Versus the General Commissioners for the Purposes of Income Tax Acts for the District of Kensington: Exparte Princess Edmond De Pligac (1917) 1 KB 486**, at page 509 the court held that:-

It is perfectly well settled that a person who makes an ex parte application to the Court that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it.

... Now the rule giving a day to the Commissioners to show cause was obtained upon an ex parte application; and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement. [Emphasis added].

24. I therefore find the respondents application with merit, the *ex parte* orders obtained by the Claimant were so obtained without disclosure of martial facts and where the contents of Petition No.100 of 2015 had been disclosed, the orders of 24th October, 2015 ought not to have issued. The sanction is to set aside the *ex parte* orders of 24th October, 2016. But the Claimant has also abused the court process! Where a party is in abuse of the court process, great sanction should result as engaging in such is wasting crucial time and circumventing the course of justice. When the Claimant was confronted with the current application filed by the Respondent he ought to have conceded and not further engage with a protracted hearing as with conceding, this should have reduced time and costs expanded by the parties.

The upshot of it is that the application dated 2nd December, 2016 is hereby allowed. With the findings above and by allowing the application, to sustain the suit herein would be to keep a record that should not have been filed in the first instance. The sanction is to hereby dismiss the suit herein with costs to the Respondent.

Dated, delivered in open court at Nairobi this 16th day of March, 2017.

M. MBARU

JUDGE

In the presence of:

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