



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

NYERI ELRC CAUSE NO 281 OF 2016

BOSCO MUTEGI KIURA.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF EMBU.....1ST RESPONDENT

THE GOVERNOR OF EMBU COUNTY GOVERNMENT.....2ND RESPONDENT

EMBU COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

RULING

1. The Claimant’s claim together with a Notice of Motion dated 21st December 2016 was filed at the Employment and Labour Relations Court at Nyeri on 22nd December 2016.

2. On 23rd December 2016, **Mbaru J** who was sitting as the Vacation Duty Judge in Nairobi considered the Notice of Motion *ex parte* and directed the Claimant to serve the Respondents for an *inter partes* hearing on 17th January 2017.

3. The main prayer in the Notice of Motion was an order directing the Respondents to release the Claimant’s salaries from November 2016. On 18th January 2017 **Mbaru J** made the following orders:

- a) That the Respondents be and are hereby ordered either jointly or severally, to unconditionally reinstate and or re-engage the Claimant as an employee consequently according him any benefits, privileges or emoluments that had been conferred on him based on his letter of appointment;
- b) That all accrued salaries due and unpaid to the Claimant shall be remitted within 7 days;
- c) That the Claimant shall continue to offer himself for the allocation of duties by the Respondents;
- d) That on all the other pending issues, the parties shall take a hearing date;
- e) That the Respondents have 14 days to file defence, serve the Claimant who will reply and be ready for hearing.

The Court subsequently issued a notice to show cause against the Governor, the County Secretary and the Secretary to the County Service Board. In default of appearance the Court issued Warrants of Arrest.

5. The Respondents then moved the Court by Notice of Motion dated 2nd February 2017 seeking the

following orders:

- a) That there be a stay of execution and enforcement of the orders made on 18th January 2017 and 27th January 2017;
- b) That the said orders be reviewed, discharged and/or set aside;
- c) That the Warrants of Arrest issued on 30th January 2017 be cancelled forthwith;
- d) That the Memorandum of Claim dated 21st December 2016 be struck out with costs;
- e) That in the alternative, the claim against the 2nd and 3rd Respondents be struck out with costs.

6. The application which is supported by the affidavit of the Acting County Secretary, Josphat Ndwiga sworn on 2nd February 2017 is based on the following grounds:

- a) That on 22nd December 2016 the Claimant filed a Memorandum of Claim and a Notice of Motion dated 21st December 2016 before the Employment and Labour Relations Court at Nyeri. The court file was transferred to Nairobi for hearing of the Notice of Motion before the Vacation Duty Judge;
- b) That the Notice of Motion *inter alia* sought for payment of the Claimant's salaries and dues from November 2016;
- c) That the filing of the claim before the Court was premature as the dispute should have been referred to the Public Service Commission as provided under Section 77 of the County Governments Act No. 17 of 2012. The Court therefore lacks jurisdiction to hear and determine the claim herein ;
- d) That the Claimant misled the Court into granting the said orders knowing very well that he had absconded from duty since 20th September 2016 without any lawful cause. The Claimant has not been terminated from employment and is guilty of material non-disclosure;
- e) That the order for payment of the salaries was issued contrary to the provisions of Section 19(c) of the Employment Act, 2007 which permits an employer to deduct wages for each day an employee is absent from duty without any lawful cause;
- f) That the Memorandum of Claim does not disclose any cause of action against the 2nd and 3rd Respondents as the Claimant has pleaded in paragraph (f) of the Memorandum of Claim that he was employed by the 1st Respondent which is a body corporate under Section 6(1) of the County Governments Act. There is therefore no privity of contract between the Claimant and the 2nd and 3rd Respondents;
- g) That it would be in the interest of justice to discharge, lift and set aside the orders issued on 18th January 2017 and 27th January 2017.

7. This application went before **Nduma J** when he was the Duty Judge and he granted a stay of execution and enforcement of the orders granted on 18th January 2017 and 27th January 2017 pending *inter partes* hearing of the application before **Mbaru J** on 8th February 2017.

8. When the parties appeared before **Mbaru J** they were referred back to **Nduma J** who recused himself and referred the matter to me.

9. I have found it necessary to set out the foregoing process details because applications such as the one now before me are ordinarily heard by the Trial Judge.

10. The Court took oral submissions on 20th February 2017. In their submissions, Counsels for the parties went to great lengths to argue for or against the orders granted by **Mbaru J** on 18th January 2017 and 27th January 2017. However, since I am not sitting as an appellate court, the only issue I need to determine is whether the Respondents have made out a case for review of the orders in question.

11. The power of the Court to review its own decisions is donated by Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Procedure Rules. Rule 33(1) provides as follows:

A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling- if there is discovery of new and important matter or evidence which, after the 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; or

b) on account of some mistake or error apparent on the face of the record; or

c) on account of the award, judgment or ruling being in breach of any written law; or

d) if the award, judgment or ruling requires clarification; or

e) for any other sufficient reasons.

12. It was submitted on behalf of the Respondents that the Claimant's claim has been brought prematurely before the Court because under Section 77 of the County Governments Act, the Claimant ought to have referred his dispute to the Public Service Commission as a first port of call.

13. The Respondents even suggested that the Court lacks jurisdiction to entertain the Claimant's claim. In this regard, Counsel for the Respondents referred the Court to the decision by **Mumbi Ngugi J** in **James Tinai Murete & others v County Government of Kajiado & 22 others [2015] eKLR** where the learned Judge held that a party aggrieved by a decision of the County Service Board must first refer the dispute to the Public Service Commission.

14. The reasoning behind this position is extremely persuasive but I am also aware that other courts have held quite the opposite (see **Andrew Shiroko**

Shilenje v County Government of Kakamega and another, Kakamega High Court Petition No 22 of 2014). It seems to me therefore that if the Trial Judge made an error on account of Section 77 of the County Governments Act, then that error would be a misapprehension of the law which can only be corrected on appeal and not in an application for review such as the one before me.

15. It was further urged on behalf of the Respondents that the orders were as a result of non-disclosure of the material fact that the Claimant had deserted duty. Moreover, the order for payment of salaries was issued contrary to the provisions of Section 19(c) of the Employment Act, 2007 which allows an employer to recover wages from an employee who is absent from duty without lawful cause.

16. The other ground raised by the Respondents is that since the Claimant was an employee of the 1st Respondent which is a body corporate, then the 2nd and 3rd Respondents are wrongly joined in these proceedings. The Respondents further contend that the orders were not personally served on the officers against whom Warrants of Arrest were issued.

17. The only thing I will say is that while these would have been good points to canvass before the Trial Judge, they cannot be points for review. In arriving at this conclusion, I am persuaded by the holding by **Mativo J** in **Michael Muriuki Ngubuini v East African Building Society Limited [2015] eKLR** that if a

court misapprehends the law or facts, the remedy for the aggrieved party does not lie in review. The option available to such a party is to go on appeal.

18. For the foregoing reasons, the Respondents' application dated 2nd February 2017 is dismissed with costs to the Claimant.

19. Finally, since this is a Nyeri matter which was transferred to Nairobi in the course of the court vacation in December 2016 which has since ended there is no reason why the file should continue to reside in Nairobi. I therefore direct that the file be transferred back to the Employment and Labour Relations Court in Nyeri.

20. The matter will be mentioned before the Judge in Nyeri on 21st March 2017 for further directions.

21. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI

THIS 10TH DAY OF MARCH 2017

LINNET NDOLO

JUDGE

Appearance:

Mrs. Wangoko for the Claimant

Mr. Issa for the Respondents