



REPUBLIC OF KENYA



Ochanda & another v Judicial Service Commission & 2 others (Cause 2046 of 2015) [2017] KEELRC 1305 (KLR) (28 April 2017) (Ruling)

Jacktone Ngolo Ochanda & another v Judicial Service Commission & 2 others [2017] eKLR

Neutral citation: [2017] KEELRC 1305 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2046 OF 2015

NJ ABUODHA, J

APRIL 28, 2017

BETWEEN

JACKTONE NGOLO OCHANDA 1ST CLAIMANT

ALICE BUSERA 2ND CLAIMANT

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

MINISTRY OF LABOUR & HUMAN RESOURCE 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. By a motion dated 17th March, 2015 the applicants seek orders of this court in the nature that pending the hearing and determination of the claim, the 1st respondent be ordered to release the claimant's salary for the months of June, July, August, September, October and November, 2014 amounting to Kshs 180,000/=.
2. The application was based on the grounds among others that:
 - i. The claimants have been working with the 1st and 2nd respondent and were attached to the Industrial Court and later the Employment Court at Nairobi.
 - ii. The claimants worked until on November 2014 when they were relieved off their duties without payment of any benefits or notice of termination of their employment contract.
 - iii. The claimants were also not paid for the days worked prior to the termination of their employment.



3. The application was further supported by the affidavit of Jacktone Ochanda who deponed on the main that:
 - i. That I was employed as a subordinate staff by the Ministry of Labour and Human Resource and was attached at the Industrial Court.
 - ii. That the 2nd Claimant was employed in February 2006 as a subordinate staff and was attached at the Industrial court.
 - iii. That I and the 2nd claimant worked for the Industrial Court until the same was transferred to the Judiciary but we still continued offering our services.
 - iv. That at the time we were working with the Judiciary our basic salary was Kshs 1000/= per day excluding house allowance which was not paid.
 - v. That on or about 1st May 2014 we received letters giving a notice of termination of our services without any reason or notice to show cause why our employment contract should not be terminated.
 - vi. That however, on consultation between the Principal Judge of the Employment and Labour Relations Court and the Deputy Registrar of the said court and the Registrar of the Judiciary who is also the Secretary of the 1st Respondent herein it was resolved that we continue working for the court.
 - vii. That I and my co-claimant continued to work for the court until on 18.11.2014 when I got verbal instructions from the Deputy Registrar of the court asking me to hand over the court's properties which I duly did as per my handing over note.
 - viii. That despite working for the court from May 2014 to 18th November, 2014 we were not paid our salaries for the said period.
 - ix. That by a letter dated 6th November, 2014 the Principal Judge of the then Industrial Court (now Employment and Labour Relations Court) wrote to the Chief Registrar of the Judiciary and requested her to facilitate payment of our salary arrears from 1st May 2014 to 31st October, 2014.
 - x. That by a letter dated November 21, 2014 the Chief Registrar of the Judiciary wrote to the Principal Judge and stated that they are not able to pay in the absence of a written communication on their service.
4. The 1st respondent in their replying affidavit sworn by Winfred Mokaya state among others as follows:
 - i. That by a letter dated 16th January 2007, the Registrar of the Industrial court requested the Ministry of Labour and Human Resource Development for the engagement of the 2nd Claimant as a casual.
 - ii. That by a letter dated 28th September 2010, the 2nd claimant was offered a job as a casual employee in the Employment and Labour court with effect from 1st September 2010 for a period of twenty nine (29) days at a daily rate of Kshs 250.00 per day.
 - iii. That by a letter dated 10th August 2011 the 1st claimant was offered a job as a casual employee for a period of twenty nine (29) days at a daily rate of Kshs 350.000 per day.



- iv. That by a letter dated 27th February 2012, the 1st claimant was offered a job as a casual employee for a period of twenty nine (29) days with effect from 1st February 2012 at the daily rate of Kshs 370.00 per day.
- v. That by a letter dated 1st May 2014, the 1st respondent terminated the 1st claimant's engagement as a casual employee. The 1st claimant was informed that his last working day would be 31st May, 2014.
- vi. That by a letter dated 1st May 2014, the 1st respondent terminated the 2nd claimant's engagement as a casual employee. The 2nd claimant was informed that her last working day would be 31st May, 2014.
- vii. That the claimants were not officially working in the Judiciary from June 2014 to November 2014 as claimed in their Notice of Motion application. Without privity of contract, the obligation to pay does not arise.
- viii. That by a letter dated 3rd June 2014, the Deputy Registrar of the Employment and Labour Relations court also confirmed that the claimants engagement in the Industrial Court had been terminated on 31st May, 2014 and requested the 1st respondent to consider their re-engagement.
- ix. That by a letter dated 7th November 2014, the Chief Registrar Judiciary requested the 2nd Claimant to furnish the 1st Respondent with communication from the presiding Judge recalling her to continue serving in the Industrial Court.
- x. That todate the 2nd claimant has not tendered any documentary proof of her engagement on temporary basis as requested for by the 1st respodnent.
- xi. That by a letter dated 21st November 2014, the Chief Registrar Judiciary informed the Principal Judge of the Employment and Labour Relations Court that 1st respondent was unable to pay the claim for the outstanding salary in the absence of a contract or written communication of the claimants service for the period 1st June 2014 to 31st October 2014.
- xii. That by letters dated 26th May 2015, the Chief Registrar Judiciary informed the claimants that the 1st respondent was unable to honour the request for payment.
- xiii. That only the Judicial Service Commission has the mandate to appoint employees to the Judiciary. Any other appointment other than by the commission is a violation of the Constitution and is consequently null and void.
- xiv. That Section 17 (1) of the *Employment Act* provides that an employer shall pay the entire amount of wages earned by or payable to an employee in respect of work done in pursuance of a contract of service. The claimants did not have any contractual relationship with the Judiciary for the period between June and October 2014 as claimed.
- xv. That Article 201 (d) of the *Constitution* obligates the commission to use public funds in a prudent and responsible way.
- xvi. That section 196 (3) of the *Public Finance Management Act* provides that the Chief Registrar Judiciary as a public officer shall not enter into any obligation that has financial implications for the national government budget unless the obligations is authorized by the constitution or an Act of Parliament.



- xvii. That in view of the foregoing constitutional and statutory provisions, the claimants' engagement between the months of June 2014 – October 2014 can only be regularized if the commission ratified their employment under section 14 of Third Schedule of the Judicial Service Act.
- xviii. That in absence of formal engagement of the claimants by the 1st respondent, the claim for payment of outstanding salaries cannot arise unless ratified and approved by the 1st respondent.
- xix. That the claimant's Notice of Motion application should therefore be disallowed.
5. The application before me seems to seek payment of salary presumably earned for work done between June 2014 and November 2014. The 1st respondent however has taken the view that by a letter dated 1st May, 2014 the applicants' services were terminated with effect from 31st May, 2014. The 1st respondent has further stated that in the absence of any letter recalling or reinstating the claimants to employment issued in contradiction or variation of the letter dated 1st May, 2014, there would be no basis for payment of salaries for the period claimed.
6. It is conceded that the applicants had a long relationship with the former Industrial Court and to a considerable extent the present one. It is also acknowledged that they may have continued to discharge their duties beyond 31st May, 2014 when their services were deemed to have been terminated.
7. However, the circumstances under which the claimants continued to serve after their services were terminated are unclear and can only be resolved after full trial. It would therefore be unsafe to make the order for payment of salaries as claimed in the instant application yet the 1st respondent has raised a reasonable defence that there was no evidence recalling or varying its letter dated 1st May, 2014 terminating the claimants services with effect from 31st May, 2014.
8. The court will therefore not grant this orders sought but direct that the matter be resolved after the full trial alongside other claims.
9. It is so ordered.

DATED & DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2017

ABUODHA J. N.

JUDGE

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge

