



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.417 OF 2016

JOSPHAT COSMAS ONYANGO.....CLAIMANT

VERSUS

TRIBE HOTEL LTDRESPONDENT

RULING

1. The Claimant by application dated 22nd February, 2017 brought under the provisions of section 1A, 1B, 3A and 63(c) of the Civil Procedure Act, section 5, 28 and 29(2) of the Contempt of Court Act, section 13, 20(7)(a), 20(8), and (9) of the Employment and Labour Relations Court Act and seeking for orders that;

1. ...

2. *HAMED EHSANI, SHANIM EHSANI and HOOMAN EHSANI the directors of the Respondent together with Elizabeth Chege the Group Human resource manager of the Respondent be cited for contempt of Court for disobeying the order of 5th May, 2016 and 20th July, 2016.*

3. *An order of committal to be made against HAMED EHSANI, SHANIM EHSANI and HOOMAN EHSANI the directors of the Respondent together with Elizabeth Chege the Group Human resource manager of the Respondent be committed to prison for such period as this Court may deem fit and just.*

4. *The costs of this application be borne by the respondent.*

2. The application is supported by the claimant's affidavit and on the grounds that by ruling of 5th May, 2016 the Court restrained the Respondent from terminating the claimant's employment pending the determination of the Claimant but on 1st August, 2016 the Respondent attempted to declare the Claimant redundant and the Court issued a preservative order stopping the operation of the redundancy notice. The Respondent is privy to these orders and they have not been set aside, reviewed or varied.

3. The Respondent partially complied with the issued orders but sent the Claimant on leave with full pay however, since January, 2017 such payments of the salaries and benefits due were stopped. Every person in respect of whom an order has been issued has an obligation to obey unless she same is discharged and the result of disobedience is committal to jail or a punishment as appropriate. The Court should not condone deliberate disobedience of orders.

4. The cited officers of the Respondent have disobeyed the Court orders and a sanction should issue.

5. The Claimant in his affidavit avers that on 31st March, 2016 the Respondent attempted to terminate his employment but on 5th May, 2016 the Court restrained the Respondent from doing so pending hearing of the main suit. After the ruling the Claimant was sent on leave citing that he had 90 leave days not utilised. After 75 days the Respondent called and issued letter dated 30th June, 2016 declaring the Claimant redundant with effect from 1st August, 2016 forcing the Claimant to move the Court and an order was issued stopping the same on 20th July, 2016.

6. Since January, 2017 the Respondent has refused to pay the due salaries and allowances and despite request to pay the Respondent has not obliged. The benefits due relate to payment of school fees for the claimant's children which has remained unpaid. The Respondent through its directors and human resource manager are guilty of contempt of Court as they have a duty to obey Court orders. The Respondent directors and human resource manager should be sanctioned with jail terms to ensure compliance with Court orders.

7. In reply, the Respondent filed the Replying Affidavit of Eyorusalem Mukulu and the human Resource Manager and avers that she is in charge of the day to day running of the Respondent human resources and competent to reply herein and give an explanation on the claimant's case.

8. Ms Mukulu avers that in September, 2016 the Respondent learnt that the Claimant had been employed at Best Western Hotel where the Respondent managed to get his letter of appointment. The Claimant refused to report back to work after his leave but the Respondent continued paying the due salaries up to December, 2016.

9. In January, 2017 the Respondent learnt that the Claimant was employed at Hotel Rio in Nairobi West and when an investigator was hired to get details, the current application was served. There is evidence that the Claimant absconded duty and has since been with another employer. The Respondent complied with Court orders until the Respondent made it impossible to comply. It is the Claimant who is in contempt of court.

10. Both parties made their oral submissions in court.

Determination

11. The Employment and labour Relations Court Act at section 12 give this Court the power to issue interim and final orders as necessary in any given case to ensure the ends of justice are met. Both parties admit that on 5th May and 20th September, 2016 the Court issue orders against the Respondent in the interim and pending hearing of the main suit and the application of the Claimant dated 20th July, 2016 respectively. Such orders are still in force as they have not been changed. Such orders remain binding on the Respondent on whom they were directed at. Any failure to comply warrants a sanction.

12. In *Teachers Service Commission versus Kenya National Union of Teachers & 2 Others* [2013] it was held that;

The reason why courts will punish for contempt of Court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the Court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the Court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.

13. In this regard, in ***Africa Management Communication International Limited versus Joseph Mathenge Mugo & another*** [2013] eKLR the Court held that;

... if respect for law and order never existed, life in society would be but short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of Court is committed. This is so because, a party who obtains an order

from Court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a Court order is fundamental to the administration of justice and rule of law. A Court order once issued binds all and sundry, the mighty and the lowly equally without exception. An order is meant to be obeyed and not otherwise.

14. The Respondent and the cited officers including the human resources manager do not make any effort to exonerate themselves from the fact of disobeying Court orders herein issued on 5th May, 2016 and 20th July, 2016. The only excuse given is that in September, 2016 the Respondent got information that the Claimant had secured new employment. That the Claimant refuse to report back to work after leave.

15. There are orders of this Court therein. The fact of the Claimant being sent on leave is not denied. Whether the Claimant failed to report back to work after he went on leave or that he has secured another job or jobs at various establishments, such are matters of fact that can be appropriately addressed by the Respondent before this court. Such matters cannot be addressed by extra-judicial means. To operate outside of the Court over matters dealt herein is a direct affront on justice, rule of law and good order in a democratic society such as ours.

16. Where the Respondent felt it was time enough to stop effecting the salaries due to the claimant, nothing stopped the Respondent from moving the Court with the new and important information sourced against the claimant. However to proceed and stop the due salaries and allowances outside of the Court process is to disobey and disregard the Court orders. Court orders are issued for a specific purpose to preserve, secure and or prevent the suit property, matter or subject to enable the Court to hear both parties and all the parties involved on their merits. Where the Respondent choses when and how to obey orders issued, such cannot be allowed as such is to contradict and render the orders of no value.

17. I therefore find the respondent, its officers the directors HAMED EHSANI, SHANIM EHSANI and HOOMAN EHSANI the directors of the Respondent together with Elisabeth Chege the Group Human resource manager of the Respondent are in contempt of Court orders of 5th may, 2016 and 20th September, 2016. Such is a serious offence punishable with a fine or jail term of both.

18. Noting the matters herein and pending hearing of the main suit, it is important for the Court to sanction the Respondent officer and directors, HAMED EHSANI, SHANIM EHSANI and HOOMAN EHSANI the directors of the Respondent together with Elisabeth Chege the Group Human resource manager of the Respondent as required under the provisions of section 20(7), (8) and (9) of the Employment and Labour Relations Court Act which provides that;

(7) A person who—

(a) without reasonable cause fails to comply with an order duly given under subsection (4); or

(b) is required by an order made under subsection (4) to furnish information, and who makes any statement or furnishes any information which the person knows, or has reasonable cause to believe, to be false or misleading in material particular, commits an offence and shall, on conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or to both.

(8) If an order made under subsection (4) is directed to a—

(a) firm or to a body corporate, every partner of the firm, and every director and officer of the body corporate shall comply with the order; or

(b) trade union, employers' organisation or federation, every official or officer of the trade union, employers' organisation or federation shall comply with the order.

(9) Where an offence is committed by a firm, body corporate, trade union, employers' organisation or federation in respect of any order made under subsection (4), every partner,

director, officer or official concerned shall be guilty of the offence unless they prove that—

(a) the offence was committed without their consent or connivance; and

(b) they exercised all due diligence to prevent the commission of the offence.

19. The sanctions and penalties due against the Respondent and its directors and officer are severe – payment by each cited officer of a sum of Kshs. One (1) million or a jail term of up to two (2) years that amounts cumulatively to Kshs.4 million and in total 8 years in jail for all the cited officers - HAMED EHSANI, SHANIM EHSANI and HOOMAN EHSANI the directors of the Respondent together with Elisabeth Chege. If this sanction is to be issued, I take it the Respondent and its officers would suffer great loss and damage for the simple reason of not complying with Court orders.

20. With this knowledge, this being a Court of equity and fundamentally keen to ensure fair labour relations, noting the orders of 5th May, 2016 and 20th September, 2016 that the Respondents have failed to comply with, the sanction shall not issue at this instance.

The Respondent is hereby given seven (7) days to fully comply with the orders of the Court and to report compliance on 18th April, 2016 and failure to which, the sanctions above shall result. The dues owing to the Claimant shall be paid with interests from the dates they are due until the date of payment.

Dated and delivered in open Court at Nairobi this 6th day of April, 2017

M. MBARU

JUDGE

In the presence of:

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