



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2596 OF 2016

DAVID MULATO DONCHE.....CLAIMANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION OF KENYA.....3RD RESPONDENT

RULING

1. The Claimant by application dated 16th December, 2016 and seeking for orders that;

Stay orders be issued to the 2nd and 3rd Respondents from appointing Chief-II Dakabaricha Location, Central Ward, Marsabit pending the hearing and determination of this matter.

That the Claimant continues to act as Chief-II Dakabaricha Location, Central Ward, Marsabit pending the heading and determination of this matter.

That the Claimant be paid his monthly salaries at a rate of

19322 x 966

20289 x 1015

21304 x 1065

22369 x 1120

23489 x 1173-24662 per month from 20h July 2015 to 15th September 2016 pending hearing and determination of this matter.

The Respondents bear the costs of this application.

2. The application is based on the grounds and affidavit of the Claimant on the basis that the Claimant was unlawfully terminated from his employment as *Chief-II Dakabaricha Location, Central Ward, Marsabit* and he appealed but has not been informed on the result of the appeal. There is now an

advertisement for a vacancy of *Chief-II Dakabaricha Location, Central Ward, Marsabit* dated 12th September, 2016 and the candidates to be interviewed have been identified. The Claimant has not received his salary since appointment and assuming office from 20th July 2015.

3. The Claimant in his affidavit also avers that on 1st December, 2014 he applied to the post of Chief Dakabaricha Location, he was interviewed and on 16th July, 2015 he was appointed *Chief-II Dakabaricha Location, Central Ward, Marsabit* vide letter sent via the Assistant County Commissioner.

4. The Claimant assumed office and had been performing his duties for 14 months when a letter dated 5th July, 2016 terminating his employment on the reasons that there was forgery of academic certificates from Kenya National Examination Council. The Claimant appealed against the termination to the Public Service Commission but has not been given any response to date. No salary has been paid since.

5. Following the termination and while the Claimant was waiting for outcome of his appeal he saw an advertisement over his position and candidates have been identified for interviews thus the application seeking urgent orders.

6. The Respondent through the Replying Affidavit of Teres Njeru, Director Office of Human Resource Management & Department for the 2nd Respondent avers that in 2015 interviews were conducted for the positions of Chiefs and Assistant Chiefs in Marsabit County and among the applicants were for the post of Dakabaricha Location, Central Ward Marsabit. Upon interviews the 2nd Respondent Marsabit office notified the Claimant of his appointment as *Chief-II Dakabaricha Location, Central Ward, Marsabit* by letter dated 16th July, 2016.

7. The practice of the Respondents is that successful candidates must submit copies of their original certificates and testimonials which include KCSE certificates and curriculum vitae and form PSC.3. In view of these requirements the Claimant submitted copy of KCSE certificate and filled forms and Declaration of the official secrets Act, Certificate of medical examination, next of kin and resume. These documents undergo verification by the 2nd Respondent office and during such verification it was noted that KCSE certificate had suspicious alternations and thus the Kenya National Examination Council was requested to confirm the claimant's results on 8th February, 2016. As this verification was on-going, the 2nd Respondent asked the Directorate of Public Service Management for the processing of the claimants salary and before this could be complete the requested confirmations returned indicating the presented certificate was forged by the Claimant to get employment with the 2nd respondent. The 2nd Respondent thus stopped the processing of the salaries initiated for the claimant.

8. Upon deliberations, it was recommended that the Claimant appointment be revoked for presenting forged documents and director of public prosecutions was to institute such charges against the claimant. The Claimant was then issued with termination of probation letter on 5th July, 2016.

9. Upon the revocation of the claimant's appointment, residents of Dakabaricha Location petitioned regarding the revocation of appointment of the Claimant but following a report and recommendation for the prosecution of the Claimant for violating chapter 6 of the constitution, the orders sought cannot issue. The application is filed with inordinate delay and indolence. He appealed to the 3rd Respondent way out of time being out of the time given in the regulations and such appeal was never sent to the 2nd respondent.

10. The Claimant is not entitled to a salary as he did not meet the required threshold for appointment. He should not be allowed to benefit from an illegality. The interim orders sought have been overtaken by events as a replacement chief for the location has already been appointed as of 23rd November, 2016.

11. The application thus lacks merit and has no basis and should be dismissed with costs. The orders sought are against public interest and policy and cannot issue as the Claimant has tainted hands and

cannot enjoy at equity.

12. The Claimant filed Further Affidavit on 21st February, 2017 and avers that the KCSE certificate he attached to his application for employment and the one attached by the Respondents is materially different and similarly the resume attached is also different. The documents submitted to the examiner were genuine photocopies of the claimant's original KCSE certificate, results slip and ascertaining documents from the Deputy Principal Marsabit Boys Secondary School together with a police abstract and letter of 6th March 2015 confirming the KCSE certificate in the original got lost. The Claimant lost the original certificates after his interview for the appointed position.

13. The Claimant also avers that the presented copies of his certificates has all the unique features and are genuine and stamped by the Deputy Commissioner. CID officers investigated the claimant's case and have since established that he did not forge any documents.

14. The interim orders have on stopping the appointment of another chief to replace the Claimant has not been overtaken by events. The Claimant has not been paid the due salaries.

15. Both parties made their oral submissions in court.

Determination

16. Application herein was filed on 16th December, 2016. The Respondent filed Replying Affidavit on 10th February, 2017. Service of the interim orders per the Affidavit of Service of John Omudanga filed on 10th January, 2017 that the Respondents were served on 21st December, 2016. On 12th January, 2017 when the matter was due for hearing, the Respondents had not replied and were allowed more time to reply.

17. In this regard, in the replying Affidavit it sets out the Claimant was terminated by revocation of his letter of appointment on 5th July, 2016. He appealed against the termination to the 3rd Respondent and not with the 2nd Respondent who directly employed him. Since the termination, the 2nd Respondent has appointed a chief for Dakabaricha Location, Central Ward Marsabit.

18. The Claimant in his Further Affidavit has challenged the respondents' averments that the position of chief Dakabaricha Location is filled. He does not state as of when this was done.

19. What is apparent is that the Claimant was appointed *Chief-II Dakabaricha Location, Central Ward, Marsabit* in 2015 and was terminated due to interrogation of his certificates on 5th July, 2016. He has lodged an appeal with the 3rd Respondent and the results not given.

20. Where termination has taken effect at the time an employee comes to court seeking reinstatement and due wages, the court in terms of section 12 of the Employment and Labour Relations Court Act read together with section 49 of the Employment Act and now Rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules will not order a reinstatement as an interim orders as this is an order for specific performance and only issued as a final order upon hearing the main suit. However in exceptional cases, the court may reinstate an employee if satisfied that on the bare facts, there exists exceptional circumstances that warrant the court to order a reinstatement in the first instance and before hearing the parties in the main cause.

21. An applicant must demonstrate the exceptional circumstances that exists in any given case to warrant the order of specific performance in the nature of reinstatement. certain forms of termination grounds, the kind that result in automatically unfair termination such as pregnancy, race, gender or religious discrimination, may warrant the rare exercise of the Court's discretion in issue of interim reinstatement. This is more so particularly under the new liberal Constitution of Kenya, which frees the hands of the Courts in administration of justice. See **Paul Nyandewo Onyangoh versus Parliamentary Service Commission & Others, Cause No.2292 of 2016.**

22. The matters set out by the Claimant in his application can best be addressed in a full hearing for the court to delve into the issue of his certificates of Kenya Certificate of Secondary Education alleged to have been lost since his interview with the 2nd Respondents and the facts that his Deputy School Principal has since issued him with a letter to certify the copies in his possession and that the Assistant County Commissioner has certified the copies and the CID have since established that the Claimant did not forge his certificates. On the averments that the Kenya National Examination Council has confirmed that the submitted documents from the Claimant are a forgery but this is challenged by the Claimant on grounds that the documents attached by the 2nd Respondent and his attachments are materially different, such are contestations that can only go into a full hearing. To determine such matters at this stage and in the interim would be to deny either party the merits of their case and also the court would not be able to interrogate the possible witnesses.

23. On the orders seeking due wages, ultimately a determination on the question of reinstatement, the lawfulness of the employment in terms of the challenge now posed with regard to the subject submitted KCSE certificates cannot be separated. Where there is a finding that the Claimant was unfairly treated and the termination warrant to be remedied, the due wage(s) can be addressed in the same context.

Accordingly, the main suit shall be heard an orders sought in the interim cannot issue at this instance. The remedies set out under section 49 of the Employment Act shall be appropriately addressed upon hearing the main suit. To thus stop the Respondent from filling the position held by the Claimant until his termination on 5th July, 2016 is not in the interests of justice.

Costs shall be in the cause.

Dated, signed and read in open court this 24th day of May, 2017.

M. MBARU

JUDGE

In the presence of:

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