



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.103 OF 2016 CONSOLIDATED WITH CAUSE NO.107 OF 2016

RICHARD MBUTHIA KAMENYA.....1ST CLAIMANT

GEORGE KAMOTHO MUTURI.....2ND CLAIMANT

VERSUS

BROADBAND COMMUNICATION

NETWORK LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th May, 2017)

RULING

The court delivered its judgment in the suit on 25.11.2016. Judgment was entered for the claimants against the respondent for:

- a) The declaration that the termination of the employment was unfair, unprocedural, wrongful and illegal.
- b) The declaration that the act by the respondent not to pay the claimants' terminal dues was unlawful, illegal, and amounts to breach of the contract of employment.
- c) The respondent to pay the 1st claimant **Kshs. 528, 154.80** and the 2nd claimant **Kshs. 408, 205.97** by 15.12.2016 failing interest to be payable at court rates from the date of this judgment till full payment.
- d) The respondent to pay the claimants' costs of the suit.

The respondent filed a notice of motion on 21.12.2016 dated 20.12.2016 through P.K. Mureithi & Company Advocates. The application invoked Order 10 rule 11 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act and all enabling provisions of law. The respondent prayed for orders:

- a) That the application be certified as urgent and heard ex-parte in the first instance.
- b) That the honourable court be pleased to order the judgment entered herein on the 25.11.2016 by the Hon. Justice Byram Ongaya and all consequential orders, awards and decrees be stayed pending the hearing and determination of the application inter-parties.
- c) That the honourable court be pleased to order the judgment entered herein on the 25.11.2016 by

the Hon. Justice Byram Ongaya and all consequential orders, awards and decrees be stayed pending the hearing and determination of the suit inter-parties.

d) That the honourable court be pleased to set aside or vary the judgment entered herein on the 25.11.2016 by the Hon. Justice Byram Ongaya and any consequential orders or decrees.

e) That the court be pleased to allow the respondent to file their response to the claim and to defend the matter out of time.

f) That the costs of the application be in the cause.

The application was based on the supporting affidavit of Felix Ambugo attached on the application. The applicant also filed on 30.03.2017 the further supporting affidavit of Felix Ambugo. The grounds urged in support of the application are as follows:

a) The claimant was under mistaken belief that a defence and response to claim had been filed because the respondent had instructed Kiminda Mwangi Kiruga Advocate to come on record and to handle the matter.

b) The failure to enter appearance or to file a response was not intentional on the part of the respondent but was due to the inadvertence on the part of the said Kiminda Mwangi Kiruga Advocate.

c) The respondent should not be made to suffer due to the failings of the said advocate.

d) The respondent was not aware of the suit until the judgment was served upon the respondent on 14.11.2016.

e) The claimants had faced criminal reports upon alleged felony of damaging, vandalising, and breaking the respondent's property and they were placed on suspension pending investigations and their contracts of employment were not terminated but the claimants had absconded duty; further the claimants were not employees but consultants. The respondent had filed a draft defence as attached on the supporting affidavit.

f) The respondent should not be condemned unheard and the judgment should be set aside.

g) The respondent is willing to comply with such terms as are just and as directed by the court for leave for the respondent to defend the suit.

The claimants opposed the application by filing on 10.01.2017 the replying affidavit of James N. Machira Advocate and filed through Muchiri Wa Gathoni & Company Advocates. The grounds of opposition as urged for the claimants are as follows:

a) Kiminda Mwangi Kiruga Advocate has personally confirmed to James N. Machira Advocate that he was not instructed by the respondent to act in the suit. The applicant has therefore come to court with tainted hands and is undeserving of the court's favourable discretion.

b) The denial of employment relationship between parties is a sham denial as the applicant admits that the claimants were suspended on account of the alleged crimes. Further, there is no pending criminal case against the claimants.

c) The said James N. Machira Advocate who acted in the suit for claimants consistently telephoned the respondent's security officer, Felix Ambugo, prior to the mention dates and the said Felix indicated to the Advocate that the respondent had no intention of filing a defence. In particular the advocates on record communicated with the said Felix on his cell-phone No.0724048110 on 07.09.2016, 08.09.2016, 19.10.2016, and 09.11.2016 and Felix indicated that the respondent had

several advocates on its panel of lawyers but was not keen to instruct one of them to act in the case. Exhibit JNM1 was an email forwarding demand letters and a hearing notice to the said Felix at felixambuga@broadcom.co.ke .

d) The said Felix had severally visited the offices of the claimants' advocates and given updates on the case.

e) The affidavits of service on all steps in the suit were filed, the service was good, and the applicant was aware of the suit.

The court has considered the parties' respective cases. The court finds that the applicant had no good reason to fail to enter appearance, or to file defence, or to attend mentions or to attend at the hearing as service was effected at every stage as per the affidavits of service on record. There is no reason to doubt that the said Felix was in constant communication with the claimants' Advocate. The court returns that at all material time, the applicant was aware of the suit but refused or for unexplained reasons failed to file defence and to attend at the hearing despite effective service in that regard. The court finds that whereas the applicant communicated to the said Kiminda Mwangi Kiruga Advocate and discussed the case as per exhibits on the further affidavit of Felix Ambugo, there is no evidence that the Advocate was instructed to act; and the applicant has not rebutted that the said Kiminda Mwangi Kiruga Advocate has in fact confirmed that he was not instructed by the claimant to act; though such intention for the Advocate to act may have been desired on the part of the applicant – but the Advocate having not filed a notice of appointment to so act, the court finds that there were no instructions for the Advocate to act for the respondent. The denial by the applicant that the claimants were its employees is defeated by the applicant's own evidence; first in the exhibits on the further supporting affidavit at the last folio, it is confirmed that they were staff on suspension; and second on the supporting affidavit exhibit FA1 in the conclusion it is confirmed that the two guards, the claimants, are still the applicant's guards, unlawful termination never took place, they were not served with termination letters and they had been summoned on 17.11.2015 and they could be redeployed. In the judgment the court found there had been unfair termination; and it is clear there had been no due process of a hearing and notice per section 41 of the Employment Act, 2007 or valid reason for termination per section 43 of the Act, or, a disciplinary action initiated in view of alleged absconding of duty. The court considers that in such circumstances, the draft defence would collapse and as submitted for the claimants, reopening the case would seriously prejudice the claimants as it is a tactic to unfairly derail the wheels of justice on the part of the applicant.

Turning back to the hearing of the suit on 09.11.2016, the hearing notice was duly served as directed by the court and a return of service filed in court on 03.10.2016. The applicant failed to attend at the hearing. In the circumstances, the court returns that the applicant having failed to enter appearance or to file response or attend court on previous dates the matter was scheduled, there was no good reason for the court not to have proceeded in the manner it happened and as envisaged in Rule 22 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

In conclusion the application by the notice of motion filed on 21.12.2016 and dated 20.12.2016 is hereby dismissed with costs.

Signed, dated and delivered in court at Nyeri this Friday, 12th May, 2017.

BYRAM ONGAYA

JUDGE