



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 147 OF 2016

MIRIAM NKATHA RIUNGU.....CLAIMANT

VERSUS

**MERU COUNTY INVESTMENT AND DEVELOPMENT CORPORATION.....
RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 28th July, 2017)

RULING

The court delivered the judgment in the suit on 04.11.2016 in favour of the claimant against the respondent for:

- a. The declaration that the termination of the claimant's contract of employment by the letter dated 09.06.2016 was unfair.
- b. The claimant is hereby reinstated back to her position as the respondent's Director for Corporate and Support Services effective the date of the dismissal 09.06.2016 upon the terms and conditions of service per the contract of employment dated 11.08.2015 or such better terms as may be agreed or become applicable and to continue in the respondent's employment with full benefits unless lawfully terminated, and, for that purpose, the claimant will report to the respondent's managing director not later than 09.11.2016 at 9.00am for assignment of duty accordingly.
- c. The respondent to pay the claimant **Kshs.800,000.00**(less lawful statutory deductions) by 01.12.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- d. The respondent to pay the claimant's costs of the suit.

The claimant has filed an application on 02.05.2017 through Muriuki Ngunjiri Advocates for orders that the honourable court be pleased to issue a conservatory order temporarily restraining the respondent and its officers from commencing or continuing any disciplinary hearing against the applicant as a consequence of the internal memo dated 27.04.2017 pending the hearing and determination of **Nyeri Civil Appeal No. 16 of 2017, Meru County Investment & Development Corporation –Versus- Miriam Nkatha Riungu**; and the costs of the application be provided for. The application is under section 12(3) (i) of the Employment and Labour Relations Court Act, Rule 17 (1) and 28(1) of the Employment and Labour Relations Court (Procedure) Rules, 2014. The application was based upon the applicant's affidavit attached thereto and the further affidavit filed on 20.07.2017. The grounds in support of the application were urged as follows:

1. The disciplinary issues raised in the memo dated 24.04.2017 which the applicant is required to respond to had been raised in this cause in the response filed in the cause for the respondent. In particular the memo of 24.04.2017 is to the effect that the respondent's board has directed the respondent's disciplinary committee to expeditiously commence and conclude disciplinary proceedings against the claimant with respect to transgressions contained in the show cause letter by the managing director dated 19.05.2016 setting out the stated disciplinary issues against the claimant. The grounds for the disciplinary hearing are similar to those set out in paragraph 6 of the response to the claim in the suit.

2. It is urged that ground 4 in the memorandum of appeal is thus, **“The learned Judge erred in law by finding that the misconduct upon which the dismissal of the respondent was critically hinged upon was not established against her, which finding is contrary to the weight of the evidence adduced before him.”** It is therefore submitted that, now that the respondent's case is that the reason for disciplinary action had been established and the court erred in finding that it had not been so established, it is double jeopardy for the respondent to subject the claimant to the disciplinary proceeding and the legitimate thing is for the respondent to await the outcome of the appeal. It is urged that clearly, if the appeal succeeds on that ground 4, then the fresh disciplinary action would be clearly superfluous because the claimant would stand dismissed by reason of the court of appeal upholding the initial dismissal. In any event, it is submitted that the fresh disciplinary hearing and proceedings are *sub judice* because the same is subject of the on-going or pending appeal. Thus, it is urged that the court of appeal should be allowed to do its job and restarting of the disciplinary process afresh would be an abuse of due process as it would render the appeal nugatory and therefore unnecessary.

3. The judgment applied to the respondent as a body corporate including the managing director and the board and the two are not separable.

4. The court is not *functus officio* because the main judgment was by the court and the court is a proper forum to deal with emerging issues consequential to the judgment including parties' positions in relation to the court's judgment as relates to the pending appeal and the purported fresh disciplinary proceedings. In particular the conservatory orders are aimed at preserving or protecting the judgment pending the appeal process. The respondent's fresh disciplinary proceedings should not be allowed to circumvent the judgment and render the judgment as well as the pending appeal nugatory. The court of appeal should be allowed to do its job.

5. If the orders prayed for are not granted the claimant will be subjected to a 2nd disciplinary proceeding based on the same allegations for which the court has made a decision and are subject of the pending appeal. It is therefore fair that the judgment be protected until otherwise varied by the Court of Appeal.

The respondent filed the replying affidavit of the respondent's chairman one Stephen Kirimi Maore on 02.06.2017 through Binyenya Thurania & Company Advocates. The grounds and submissions in the opposition to the application are as follows:

1. The court is *functus officio* in that having rendered itself in the judgment, the court lacks jurisdiction to entertain and decide the present application. The respondent relies upon the Court of Appeal's judgment in **Telkom Kenya Limited –Versus- John Ochanda(Suing on own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014]eKLR** where the court (Githinji, Karanja, and Kiage JJ.A) stated, **“The Supreme Court in RAILA ODINGA v IEBC cited with approval an excerpt from an article by Daniel Valan Pretorius entitled, “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in which the learned author stated; “The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to**

any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.” The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *JERSEY EVENING POST LTD vs AI THANI* [2002] JLR 542 at 550, also cited and applied by the Supreme Court: “A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

2. It was further urged for the respondent that in the ruling delivered on 09.12.2016 by the court in this cause and declining stay of execution pending appeal, the court stated thus, “**The court considers that the claimant has disputed that the respondent’s board has resolved to appeal against the judgment and absence of evidence of such resolution serves as an impetus to decline the application.**” It was urged that the same standard must be applied and the claimant having disputed the validity or competence of the pending appeal for want of authority of the board in filing the appeal, the applicant should not seek refuge in the pending appeal as a reason to stay the fresh or continuing disciplinary hearing and action. The applicant having questioned the competency of the appeal, she must not be permitted to depart from that position and be allowed to depend on its pendency in urging her case.

3. That it was conceded by the respondent that as per ground 4 in the memorandum of appeal, the respondent challenges the findings by this court that the misconduct upon which the claimant had been dismissed by the respondent had not been established against the claimant. The respondent further conceded that if the court of appeal finds that the appeal is successful upon the said ground 4 of appeal then the fresh or currently challenged disciplinary process would be moot – as by such success on appeal would render the claimant dismissed per original dismissal by the respondent. Thus, it was submitted for the respondent that if the current application failed and the fresh or currently challenged disciplinary process were to go on and the claimant dismissed, the appeal would invariably be rendered nugatory – and it was submitted that in which event, the pending appeal would be amenable to an option of being withdrawn at the instance of the appellant as unnecessary.

The court has considered the parties’ respective positions and submissions. The court makes findings as follows.

First, the court returns that it is not *functus officio*. From the authority cited for the respondent, it is clear that the court is not being asked in the present application to revisit the merits of its final decision as rendered in the judgment. The application before the court seeks to preserve parties’ rights and obligations in view of the judgment and the ensuing and pending appeal against the judgment as well as the fresh or the currently challenged disciplinary process said to be in line or in satisfaction of the court’s judgment. In that regards it cannot be said that the court has no legitimate engagement in view of the judgment and the pending appeal or recommenced and currently challenged disciplinary proceedings or hearing. As per the cited authority, the court returns that it is entitled and it is not *functus* in so far as it is being asked to engage on or about matters about satisfaction of its own judgment. The court has not been asked to re-open the case on its merits. Accordingly, the court returns that it is not *functus officio* as urged for the respondent with respect to the current application which seeks preservation of the parties’ rights and obligations under the judgment and pending the hearing and determination of the appeal.

Second, the court returns that there is no doubt that there is a pending appeal whose record has been filed including the memorandum of appeal. In so far as the memorandum of appeal is on record, the court

returns that the applicant is entitled to rely on it such as the applicant has invoked ground 4 of the memorandum of appeal towards urging her present case. The court returns that there is no coherent and established principle in law to bar such reliance by the applicant upon the record of appeal merely because in the ruling of 09.12.2016 the court had favourably considered the lamentations by the applicant that she disputed that the respondent's board had given authority to the filing of the appeal.

Third, the court returns that in the appeal per ground 4 in the memorandum of appeal it is clear that the respondent challenges the court's finding that the respondent had not established the reason for the dismissal. It is not disputed that if the appeal succeeds upon that ground, then the fresh or currently challenged disciplinary hearing or proceeding would not be necessary as the applicant would by that successful appeal stand dismissed. Accordingly, the court returns that the fresh or currently challenged disciplinary hearing or proceedings would be *sub judice* that is, it is a matter clearly currently under the consideration by the Court of Appeal – and under the *sub judice* rule, it would be an abuse of due process for the respondent to proceed with the disciplinary hearing in light of the pending appeal. Needless to state and as conceded for the respondent, proceeding with the currently challenged disciplinary hearing would render the appeal nugatory and merely a moot proceeding. It is settled that courts of law would not act in vanity. The court therefore returns that by reason of the *sub judice* rule and towards the preservation of the pending appeal, the applicant would be entitled to the remedy of a conservatory order as prayed for.

In conclusion, the application filed for the claimant on 02.05.2017 is hereby allowed with orders as follows:

- a. That there is hereby issued a conservatory order temporarily restraining the respondent and its officers from commencing or continuing any disciplinary hearing or proceedings against the applicant as a consequence of the internal memo dated 27.04.2017 pending the hearing and determination of *Nyeri Civil Appeal No. 16 of 2017* between *Meru County Investment & Development Corporation –Versus- Miriam Nkatha Riungu.*
- b. The respondent to pay costs of the application.

Signed, dated and delivered in court at **Meru** this **Friday, 28th July, 2017.**

BYRAM ONGAYA

JUDGE