



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.147 OF 2016

KENNETH MWANGI NJOROGE.....PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

THIKA WATER AND SEWERAGE COMPANY LIMITED.....2ND RESPONDENT

BOARD OF DIRECTORS,

THIKA WATER AND SEWERAGE COMPANY LIMITED.....3RD RESPONDENT

RULING

1. The ruling herein relates to two (2) applications, one filed by the petitioner and dated 5th December, 2016 and the other filed by the respondent and dated 15th December, 2016.

2. The Petitioner by Chamber Summons based on the provisions of articles 3, 10, 22, 23, 50, 159 and 162 of the constitution and section 12 of the Industrial Court Act, rule 16 and 32 of the Industrial Court Rules is seeking for orders that;

(1) Spent.

(2) The statutory deduction to the County Pension Fund (CPF) of 86,844.71 per month be remitted as per the CPF regulations to the applicant/claimant's account.

93) The respondents do produce before the court the valid reasons for their unilateral/action of withholding the salary and statutory deductions of the claimant

(4) That a conservatory order be issued restraining the respondents or any of them and any state officer or organ of state from carrying on with the process of withholding applicant/petitioner's salary, and/or terminal benefits

(5) Pending the hearing and determination of the substantive constitutional petition a conservatory order be issued restraining the respondents or any of them and any state officer or organ of state from carrying on with the process of filling the applicant/petitioner's vacancy and/or appointment.

(6) In the alternative to (2) and (3) above a declaration order be and is hereby issued that it would be unconstitutional for any person, state officer or state organ to carry on with the process of appointment, halting the payment of salary, pension, statutory deduction and/or terminal benefits

of the applicant/petitioner.

(7) Costs be provided for.

3. The application is supported by the petitioner's affidavit and on the grounds that he is a permanent employee of the respondents who have now acted in bad faith and purported to stop his remuneration. No salary or statutory deductions have been made and no reasons are given for the same. This is unfair and unlawful. Owing to withholding of salary, the petitioner shall suffer and his employment with the respondent is compromised.

4. Other grounds are that the petitioner is the founder of the respondent company and there exists an agreement for transfer of customer contracts, operational assets, staff and operational liabilities and thus the respondents' action is unprocedural. The withholding of salary, terminal benefits, statutory deductions and pension is unconstitutional and contrary to fair labour relations.

5. In his affidavit, the petitioner avers that on 9th February, 2007 the then Ministry of Local Government transferred him from the then Nairobi City County to Thika Municipal Council as the General Manager, Water Department. He was to assist the Council in constituting and operationalizing the water company as under the Water Act, 2002. On 7th September, 2009 the Council Agreed with the water company on the transfer of customer contract, operational assets, staff and operational liabilities.

This included staff transfer, remuneration, payment obligations which arose out of employment with the transferring agency.

6. The 2nd and 3rd respondents filed a Replying Affidavit sworn by Moses Kinya, the Managing Director and aver that the application and petition should be struck out *in limine* as there is no employment relationship between the parties. The petitioner's employment contract has since lapsed on 2nd October, 2015. Such contract has not been renewed.

7. The 2nd and 3rd respondents advertised for the position of managing director, the petitioner did not apply and thus cannot be heard to complain that this is his job.

The 3rd respondent never appointed the petitioner as a technical manager. The petitioner was unlawfully remunerated for the period of November, 2015 to November, 2016 and he should refund such payments as his position had not been ratified by the respondent's board.

8. In the 2nd application filed by the respondent's, the orders sought are that the interim orders issued to the petitioner on 6th December, 2016 be vacated and or set aside and in the alternative the respondents be allowed to give a suitable undertaking as security for the claimed salaries pending the hearing and determination of the matter.

9. The application is supported the affidavit of Moses Kinya, the Managing Director of the 2nd respondent and on the grounds that the petitioner is no longer an employee of the respondents and any payment of salary to him by the 2nd respondent will be unlawful and contrary to public policy. Once such salaries are paid the petitioner will not be able to reimburse the same. The orders issued on 6th December, 2016 were without the matter being heard and to the detriment of the respondents.

10. The petitioner, the 2nd and 3rd respondents filed their written submissions. Determination

11. The application by the petitioner is filed as a Chamber Summons contrary to the Rules of the Court, the Employment and Labour Relations Court (Procedure) Rules, 2016. I will however address the substantive issues raised in the application.

12. However, even before delving into the substantive issues, the application is premised on the

provisions of a non-existent legislation, the *Industrial Court Act*, which has since been repealed and in existence is the Employment and Labour Relations Court Act, 2011. The rules relied upon are also non-existent as the *Industrial Court Rules* no longer apply and in place are the Employment and Labour Relations Court (Procedure) Rules, 2016. These errors on the record are problematic even with the best effort by the court to deal with the substantive issues herein as based on the reliance of wrong rules of procedure, the orders sought being based on section 16 and 32 refers to something different other than what the body and grounds of the applications is premised upon. This is a serious omission noting the petitioner has benefit of counsel.

13. The petitioner is seeking to have statutory deductions be deposited with the CPF on a monthly basis; that he should be given reasons for the withholding of salaries and deduction not remitted; and that the court should issue conservatory orders restraining the respondents from filing the position he held as such would negate his constitutional rights.

14. To support the application, the petitioner has attached his letter of transfer dated 9th February, 2007 and an agreement for the transfer of customers, operational assets, staff and operational liabilities between Municipal Council of Thika and Thika Water and Sewerage Company Ltd. In reply, the 2nd and 3rd respondents have attached an Employment Agreement between Thika Water and Sewerage Company Ltd and the petitioner but only executed by the 3rd respondent and at paragraph (1) seeks to renew an employment contract for the petitioner for 3 years with effect from 2nd October, 2012.

15. I take it that by the fact of the petitioner not signing this agreement, he did not accept it and the employment sought to be renewed had as of this dated of 2nd October, 2012 ceased. At paragraph 9 of Mr Kinya's Replying Affidavit dated 15th December, 2016 he avers that the petitioner's employment with the respondents came to an end on 2nd October, 2015.

16. In reply to the respondents, application dated 15th December, 2016, the petitioner at paragraph 3 avers that he was demoted to the position of technical manager and his salary reduced. He has attached pay slips for February, 2014; June, 2016; and January, 2016 which show he was managing director and technical manager respectively.

17. What is apparent is that the orders sought by the petitioner are seeking to secure his employment with the respondent's. The stoppage of salary and other benefits that go with employment and deduction of statutory dues go with employment. As such, with the court addressing the question of the petitioner's employment with the respondent's, whether there are inherent violations or not or whether the same should be secured, the payable statutory dues will also be addressed.

18. The petitioner does not diverge his current employment status with the respondent's. What is clear though is that he is no longer receiving a salary. The respondents assert that the petitioner's employment contract has since lapsed and thus continued payment of salaries or statutory dues remittance as directed by the court on 6th December, 2016 would defeat justice as the petitioner is no longer their employee.

19. As noted above, the question of the petitioner's employment status with the respondents once addressed, the rest issues will be clear. Such are matters that require the call of evidence and cannot be surmised at this stage. To do so on the basis of evidence and materials on record would deny the court that crucial aspect of interrogating all relevant materials in the possession of both parties so as to arrive at a fair resolution of the issues herein.

20. Once the court is able to address the question of employment, the remedies under section 12 of the Employment and Labour Relations Court Act, 2011 and section 49 of the Employment Act, 2007 will be available to the petitioner where such are deserved. To issue the orders sought at this instance and without the benefit of more evidence save for what is provided would cause injustice. Final orders in the nature of due salaries, statutory deductions and or preservation of the petitioner's employment with a reinstatement or reengagement are remedies available in law and cannot be negated by not being secured at this stage. See **Paul Nyandewo Onyangoh versus Parliamentary Service Commission & Others, Cause**

No.2292 of 2016.

21. In **John Njeru versus Intex Construction Ltd, Cause No.715 of 2017** the court held as follows;

- *such matters requires call of evidence and where the court is satisfied that indeed there was unfairness in terms of procedure or the substantive reasons that led to the dismissal of the employee, there are remedies of reinstatement, re-engagement and or compensation under section 49 of the Employment Act, 2007 read together with section 12 of the Employment and Labour Relations Court Act, 2011.*

Accordingly, application dated 5th December, 2016 is hereby dismissed and application dated 15th December, 2016 allowed to the extent that the interim orders herein and issued on 6th December, 2016 are vacated. Costs in the cause.

Delivered in open court at Nairobi this 11th day of August, 2017

M. MBARU JUDGE

In the presence of:

Court Assistant: David Muturi

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