



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

JUDICIAL REVIEW NO.2 OF 2017

(Before D. K. N. Marete)

REPUBLIC.....CLAIMANT

VERSUS

THE NATIONAL GOVERNMENT CONSTITUENCY

DEVELOPMENT FUND BOARD.....1ST RESPONDENT

REFLE TOM MONGARE OMANWA.....2ND RESPONDENT

JUDGEMENT

This is a Judicial Review application by way of Notice of Motion dated 16th February, 2017 seeking the following orders of court;

a. THAT this honourable court be pleased to issue an order of Certiorari removing unto this court for purposes of being quashed forthwith the Respondent's letter dated 25th November 2016 and all proceedings connected therewith and further compel the Respondent by an order of Mandamus to reinstate the Exparte Applicant unto his employment with all the accrued benefits and general damages suffered thereof.

b. THAT the costs of the Application be provided for.

The matter had opened up with an application for leave to institute judicial review by way of Chamber Summons dated 14th February in which this court issued the following orders;

(i) That leave be and is hereby issued to the Applicant to file a motion of Judicial Review for orders of certiorari and mandamus as particularized at paragraph 1 of orders sought in the application.

(ii) That leave operates as a stay of the Respondents letter dated 2.11.2016 and all connected proceedings till hearing and determination of this application.

The respondent in a Replying Affidavit sworn on 24th March, 2017 denies and rubbishes the application as an abuse of the process of court and also not disclosing any cause of action and prays that it be dismissed with costs.

The Ex-Parte applicant in answer to the Replying Affidavit files a Further Affidavit sworn on 15th May, 2017.

By an application by way of Notice of Motion dated 23rd June, 2017, the ex-parte applicant comes back to court in search of the following orders of court;

a) THAT his Application be certified urgent and the same be heard Exparte in the first instance.

b) THAT this Honorable court be pleased to order that the Respondent's Chief Executive Officer; Mr. Yusuf Mbuno be committed to Civil jail for a period not exceeding six (6) months or for such term as the Honourable court may deem fit and just to grant.

c) THAT the Respondent be ordered to forthwith purge the contempt by reinstating in the payroll the name of the Exparte Applicant

and do undertake such acts which are in countenance with a stay of the effect of the letter dated 25th November 2016 and or the connected proceedings flowing therefrom.

d) THAT this Honourable court to grant such other or further orders as may be necessary for the ends of justice and to safeguard and protect the dignity of this Honourable court.

e) THAT costs of this Application be provided for.

i. THAT the Respondent has and continue to disobey the express orders of this court granted on 14th February 2017 by Honourable Justice D. K. Njagi Marete, a Judge in the Employment and Labour Relations Court at Kericho.

ii. THAT the Respondent was duly served with the said orders on the 22nd day of February 2017 and the Honourable court has previously through the Respondent's counsel on record expressed the need to have court orders complied with.

iii. THAT from the actions of the Respondent and their response in court, the Respondent is not keen to comply with this Honourable court's orders.

iv. THAT the dignity and authority of the Honourable court ought to be respected and orders flowing there from must be religiously complied with to the letter.

The application for contempt of court above is countered by an application by way of Notice of Motion dated 28th July, 2017 in which the respondent seeks the following orders of court;

i. This Application be certified as urgent and heard *ex parte* in the first instance.

ii. Pending the hearing and determination of this Application *inter partes*, this Honourable Court be pleased to set aside the Orders of Court issued by Hon. D. K. Njagi Marete on 14.02.2017 more specifically, an Order staying the Respondent's letter dated 25.11.2016 and all connected proceedings thereof.

iii. In the alternative to ii above pending the hearing and determination of this Application the Honourable Court be pleased to set aside the Orders of Court issued by Hon. D.K. Njagi Marete on 14.02.2017 more specifically, an Order staying the Respondent's letter dated 25.11.2016 and instead peg the reinstatement of the Applicant upon the determination of the Judicial Review herein.

iv. This Honourable Court do set aside and/or vary the orders issued by Hon. Justice D.K. Njagi Marete on 14.02.2017 staying the Respondent's letter dated 25.11.2016.

v. Costs of this Application be provided for.

This is grounded as follows;

1. The Applicant moved this Honourable Court *ex parte* on 14.02.2017 and was granted leave to file motion on Judicial Review to seek the orders of *Certiorari* and *Mandamus* for purposes of quashing the Respondent's the letter dated 25.11.2016 and proceedings connected thereto and further compel the Respondent to reinstate the Applicant unto employment.

2. The leave so granted operated as stay of the Respondent's letter dated 25.11.2017 and all connected proceedings thereof till motion is heard and determined.

3. The Applicant's Application under Certificate of Urgency dated 14.02.2017 was premised on willful misrepresentation and non-disclosure of material facts to this Honourable Court. More specifically, the Applicant misled the Court that:-

i. The Applicant was on a renewable contract as a Fund Account Manager within Scale 8 of the Respondent's job grade.

ii. Despite being interdicted on 29.07.2015 for undertaking fraudulent activities in Mbita Constituency which led to the loss of millions of shillings and being issued with a notice to show cause on 19.07.2015 and being invited for a disciplinary hearing on 6.11.2015. That no finding was ever reached save for the determination of the Board not to renew his contract.

iii. The Applicant was transferred from Mbita Constituency on 30.06.2014.

iv. The Audit Report referred to which uncovered the loss of millions of shillings is for financial year 2014/2015 and conducted in the Applicant's absence without his input.

v. The Applicant served the Respondent diligently since the year 2007 and no issues have been raised concerning his competence.

4. The allegations made by the Applicant are not true and had the Honourable Court been apprised of the true fact, it is likely that it would not have granted the orders issued on 14.02.2017.

5. The Applicant's contract was renewed by the Respondent on 7.9.2013 for the position of a Fund Account Manager as Scale 8 for a period of three (3) years which ended on 7.9.2016.
6. The renewal of contract was subject to a written request to the Board by the Applicant at least 6 months prior to the expiry of the existing contract. The Board would then consider whether or not to renew the contract. A renewal of contract was not automatic but discretionary and subject to good performance.
7. On 22.6.2015 the Respondent held a Board meeting to discuss the audit report of constituencies for the financial year 2013/2014. It was observed in that meeting that Mbita Constituency while under the tenure of the Applicant had lost Ksh11,150,000 through fraudulent activities 14 projects. The Board resolved to interdict the Applicant and resolved to forward the matter to Criminal Investigation Department and Ethics and Anti-Corruption Commission for further action.
8. The Applicant was interdicted on 29.7.2015 for the fraudulent activities carried out at the Constituency Development Fund in Mbita Constituency. On 31.7.2015 a formal request was made to Ethics and Anti-Corruption Commission to prosecute the matter due to its criminal nature in accordance with Section 49 (2) of the Constituency Development Fund Act of 2013 (Repealed).
9. In a letter dated 20.5.2016 the Applicant made a request for renewal of his employment contract. The request was made out of time outside the 6 months' notice period since his contract was to end in September, 2016.
10. Due to the huge number of contracts for Fund Account Managers ending around this period of time. A circular was made by the Respondent on 27.9.2016 to all the Fund Account Managers whose contracts were ending with the effect of extending their contracts for 3 months as the Respondent deliberated on the requests for renewals.
11. On 22.11.2016 the Respondent made a circular with the effect that the above mentioned 3 month's extension of contract affecting the Fund Account Managers shall be extended up to 30.11.2016.
12. On 22.11.2016 a Board meeting was held to further deliberate on the constituencies audit report and the issue of renewal of contracts for Fund Account Managers. The meeting resolved not to renew the Applicant's employment contract together with other Managers who had disciplinary cases of fraud, misappropriation of funds and their failure to account for the same.
13. The Applicant was informed of the decision not to renew his contract on 25.11.2016 due to gross misappropriation of public funds and fraudulent activities in Mbita Constituency. Further, it was reiterated that the extended contract was also ending on 30.11.2016. His dues were calculated and provided to him subject clearance.
14. There is urgent need for his Honourable Court to set aside its interim orders issued on 14.02.2016 the Applicant has come to court with unclean hands. Serious integrity concerns had been raised against the Applicant. He cannot be trusted with public funds.
15. A prayer for reinstatement cannot be allowed Ex parte stipulated under Rule 16(8) (a) of the Industrial Court Rules, 2010. Such an Order can only be made upon a claimant filing a statement of claim and praying for such orders upon which the Honourable Court can determine the matter and order for reinstatement, if necessary.
16. The stay granted orders granted by the Court staying the letter dated 25.11.2016 (a response to the Applicant's request for renewal of contract). The letter was a follow up to the circular dated 2.11.2016 which communicated the expiry of the 3 months' extended contract. The stay orders should be vacated since they were incapable of being complied with as the Applicant did not and still does not have a contract with the Respondent. The enforcement of those orders would be an illegality in itself.
17. The Respondent stands to suffer irreparable harm and loss since it has found itself in a vulnerable position and could easily lose huge amounts of public funds under the Ex parte Applicant's continued stay at the Fund management.
18. Moreover, in the event the Honorable Court awards damages to the Respondent. The Applicant is not in a position to refund monies that may be lost during the pendency of the ex parte orders.
19. It is just and equitable that this Application be heard immediately and the orders sought be granted.
20. Since the said Orders were granted on the basis of fundamental misrepresentations and non-disclosure of material facts by the Applicant, it is only proper and justifiable that this Honourable Court set aside the Orders in place.
21. The Applicant will suffer no prejudice if the Orders are set aside. In any event, this Honourable Court has power to award damages in the highly unlikely event that the Applicant will suffer harm, if any.

The Ex-parte applicant in her submissions dated 24th October, 2017 chose to build on her application for contempt of court dated 23rd June, 2017. It is her case that the respondent is contempt of court for non compliance and disobedience of court orders made on 14th February, 2017 as follows;

- i. That leave be and is hereby issued to the Applicant to file a motion of Judicial Review for orders of certiorari and mandamus as particularized at paragraph 1 of orders sought in the application.

ii. That leave operates as a stay of the Respondents letter dated 25.11.2016 and all connected proceedings till hearing and determination of this application.

His further case is that the respondents having been served with the orders of court as above spelt out have continued to disobey and unnecessarily counter the court orders instead of implementing the same. This is by bringing out a case of expiry of the claimants contract of employment and other reasoning thereby frustrating the re-absorption of the claimant to office. The respondent's response to the whole matter and reluctance to comply appears like a suggestion that the orders of court ought not to have issued in the first place. This is outright contempt of court and should be punished.

In further support of her case the Ex-parte applicant sought to rely on the authority of **Katsuri Limited vs Kapurchand Depar Shah (2016) eKLR** at paragraph 15 the court quoted with approval the book of **Nigel Lowe & Brenda Sufrin; The law of contempt** as follows;

“Coercive orders made by the courts should be obeyed and undertaking formally given to the courts should be Honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place....”

Again, in **Econet Wireless Kenya vs Minister for Information & Communication of Kenya & another [2005] KLR 828** where Ibrahim, J. (as he then was) observed as follows;

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom an order is made by court of competent jurisdiction, to obey it unless and until that order is discharged, the uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

The Ex-parte applicant thus rests a case of contempt of court.

The respondents in their written submissions dubbed Written Submissions in Support of Respondent's Application dated 28.7.2017 (Setting Aside Ex Parte Orders) and in Opposition of the Applicant's Application dated 23.6.2017 (Contempt Application) dated 31st October, 2017 submit that the Ex-parte Application dated 14th February, 2017 was premised on willful, misrepresentation and material non disclosure to court as follows;

i. *The Applicant was on a renewable contract as Fund Account Manager within Scale 8 of the Respondent's job grade.*

ii. *Despite being interdicted on 29.07.2015 for undertaking fraudulent activities in Mbita Constituency and being issued with a notice to show cause on 19.07.2015 and attendance of a disciplinary hearing on 6.11.2015. That no finding has ever been reached save for the determination of the Board not to renew his contract.*

iii. *The Applicant was transferred from Mbita Constituency on 30.06.2014 and therefore the financial year started on 01.07.2014 and ended on 30.06.2015 during which time he was serving Teso North Constituency.*

iv. *The Audit Report referred to which uncovered the loss of millions of shillings was for the financial year 2014/2015 and conducted in his absence without his input.*

v. *The Applicant served the Respondent diligently since the year 2007 and no issues have been raised concerning his competence.*

The respondent's further submit a series of events at the work place resulting in fraudulent activities involving fourteen projects in Mbita Constituency under the helm and management of the Ex-parte applicant. He was interdicted and the matter referred to the Criminal Investigations Department (CID) and the Ethics and Anti-corruption Commission for action. The respondent made collegiate extension of contract for three and a further three months ending on 30th November, 2016 in which time she deliberated on requests for renewal of contracts. On 22nd November, 2016 the respondent's board resolved that the Ex-parte applicant's contract, together with those of other managers who have disciplinary cases of fraud and misappropriation of funds would not be renewed, or at all. This was communicated to the applicant on 25th November, 2016 and on clearance was paid all his dues.

On a further examination of the application for contempt of court, the applicant submits a case of non compliance with section 30 of the Contempt of Act, No.46 of 2016 in that due notice of thirty days was not issued to the 1st respondent by the court. This in effect invalidates the contempt proceedings herein and all consequential orders.

The respondent further submits that the standard of proof required in contempt proceedings is higher than the ordinary one of a balance of probabilities. It equates or falls near to the criminal one of beyond reasonable doubt due to the essential nature of contempt proceedings: on proof, the orders granted would deprive a person of his liberty. This is illustrated in the authority of **Hakika Transport Services Limited v Kenya Long Distance Truck Drivers & Allied Workers Union [1985] KLR 229.234** as cited in **TSC v. KNUT** and stated that;

“the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, as beyond reasonable doubt. The Respondent has not met the standard of proof, whether on the balance of probability, on a standard almost but not exactly as beyond reasonable doubt, or on the standard of beyond reasonable doubt.”

Again in the authority of **Sam Nyamweya & 3 Others v Kenya Premier League Limited & 2 Other [2015] eKLR Justice Aburuli the C.A in**

Shimmers Plaza Ltd (Supra) also affirmed the position in the Martin Wambora case (Supra) and emphasized that;

“It is important however, that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.”

The respondent further submits a case for setting aside of stay orders for being sought and issued through willful and material non-disclosure of facts. This is by a recital of the evidence of non-disclosure as hitherto expressed in this judgement.

The Ex-parte applicants application, she submits, was a disguised attempt at seeking reinstatement through the back door and should therefore be dishonoured for flouting rule 16 (8) (a) of the Employment and Labour Relations Court (Procedure) Rules, 2016. This is illustrated in the authority of **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR** where the court observed thus;

“Some of the employees have approached the Court Seeking ex parte orders of reinstatement. Rule 16 (8) (a) of the Industrial Court (Procedure) Rules 2010, states that the Court shall not grant an ex parte order which reinstates an employee whose service has been terminated. Interim reinstatement should not be granted ex parte.”

I agree with the respondent’s submissions on non compliance with section 30 of the Contempt of Court Act, 2016. The requisite notices for contempt of court were not issued by court, or at all. This provides as follows;

(1) Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

(2) No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceeding should not be commenced against the accounting officer.

(3) A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.

(4) If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.

(5) Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributed to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.

(6) No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.

There is no evidence of compliance with this critical requirement of the law. This casts a shadow on the efficacy of the contempt proceedings before court. The orders of court thereof loosen on the part of their enforceability.

The respondent’s case and submissions also bring out a case of the Ex-parte applicant seeking and obtaining ex- parte court orders through non-disclosure of material facts relating to the case. The respondents deem this as willful and I have every reason to agree with them. It is now clear and obvious that at all material times pertaining to these proceedings, the Ex- parte applicant was aware of the particulars and circumstances of this case. He chose not to disclose these to court thereby occasioning the kind of award made by court at interlocutory level. This is mischief. Like is submitted by the respondents, there were other avenues for genuinely seeking the relief of reinstatement.

I also agree with the respondent’s case and submission on the place of contempt of court proceedings. These have their religious place in adversarial litigation under the common law due to their obvious and implicit repercussions on the liberty on the contemnor. They cannot and should not be taken for granted. Their basic principles and philosophy should be observed to the letter. This is because of the emerging place of our law on human rights and basic liberties which has now capped the jurisprudence on personal liberty.

To me, the substance of these proceedings does not bring out a case of contempt of court. What with the various faultlines outlined and highlighted by the respondents against contempt of court. These are *inter alia*;

- material non-disclosure
- non-compliance with section 30, Contempt of Court Act, 2016, and
- respondent’s recall of the Ex-parte applicant back to office on service and realization of the court orders.

These serves to dilute a case of contempt of court. The respondent’s reaction on the court orders as expressed in bullet 3 above is an indicator of good faith on her part. This should be commended in the circumstances.

The net effect of these proceedings would bring out a determination of the issues in dispute as follows;

i. The contempt of court application dated 23rd June 2017 be and is hereby dismissed for being incompetent and bad in law.

ii. The respondent's application dated 28th July, 2017 for setting aside the Ex-parte orders be and is hereby allowed.

On such a finding, what balances are left for determination in the suit? This is the onset Judicial Review application dated 14th February, 2017. The next question is whether this application is substantive for further interrogation and determination in view of the above findings? My answer is no. Section 3 of the Employment and Labour Relations Court Act, 2014 provides for the principal objective of the Act as follows;

3. (1) *The principal objective of the Act is to enable the Court to facilitate the just, expeditious and proportionate resolution of disputes governed by this Act.*

(2) *The Court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).*

(3) *The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.*

This mandates the court to facilitate just expeditious and proportionate resolutions of disputes before it. This is now termed the oxygen principle or the double O's and defined as follows;

*The double O's in the phrase Overriding Objectives are what coined what is today famously known as the term Oxygen Principle. In **Hunker Trading Company Limited vs Elf Oil Kenya Limited** perhaps the first case to be grounded on the new provisions the Appellate Jurisdiction Act (Sections 3A and 3B), it was held that section 1A of the Civil Procedure Act came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. It states:-*

“the overriding objective of this Act and rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil dispute governed by the Act.”

*Considering the above provisions which introduced the oxygen principle, the court in **Kamani vs. Kenya Anti-Corruption Commission** drew comparisons to the **Wolf reforms** which introduced similar provisions in England in 1998 by way of the Civil Procedure Rules and further considered the English case of **Bigizi vs Bank Leisure** in which **Lord Woolf** himself talked about the concept of overriding principle objective as follows;*

“Under the (Civil Procedure Rules) the position is fundamentally different. As rule 1.1 makes clear the (rules) is a new procedural code with the overriding objective of enabling the court to deal with cases justly. The problem with the position prior to the introduction of the (rules) was that often the court had to take draconian steps such as striking out the proceedings...”

The overriding objective of the court is clearly spelt out under sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya. This is also replicated under sections 3A and 3B of the Appellate Jurisdiction Act, Chapter 9, Laws of Kenya as follows;

3A (1) *The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.*

(2) *The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*

(3) *An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the process of the Court and orders of the Court.*

3B. (1) *For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:-*

a) *The just determination of the proceedings;*

b) *The efficient use of the available judicial and administration resources;*

c) *The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and*

d) *The use of suitable technology.”*

This is all geared at meting out justice expeditiously and also an efficient utilization of available resources.

It is my imagination that the application dated 14th February, 2017 does not serve any further or useful purpose in the circumstances. It is not salvable. It is in the interest of justice that it be determined and dismissed. This is because, with a determination of her baby applications

as above, the application enters a state of self destruction. Any further continuance with the application would not serve the overriding objective of this court. It would frustrate the quest for just expeditious, proportionate and affordable resolution of disputes covered by this court. This is because in the cause of determination of the budding applications, the salient issue(s) in these applications have been fully interrogated and determined.

This court shall not be rendered impotent in its pursuit of justice. It shall take up its position and roll to do justice at all times. This is more so with the onset of the oxygen principle which now comes in handy to disentangle the court in its articulation of justice. As was observed by **Sir Dinshah Mullah** in **The Code of Civil Procedure** observes that;

*“the code of Civil procedure is not exhaustive, the simple reason being that the legislature is incapable of contemplating all the possible circumstances, which may arise, in future litigation, and consequently, for providing the procedure for them. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act **ex debito justitiae** for doing real and*

*substantial justice between the parties. The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act **ex debito justitiae**, and to do real and substantial justice for the administration, for which alone, it exists. However, the power, under this section, relates to matters of procedure. If ordinary rules of procedure result in injustice, and there is no other remedy, they can be broken in order to achieve the ends of justice...”*

This is now employed and applied with a view to coming out clean on a quest for justice.

I am therefore inclined to as well dismiss this application and overall come up and issue the following orders of court;

- i. The contempt of court application dated 23rd June 2017 be and is hereby dismissed for being incompetent and bad in law.
- ii. The respondent’s application dated 28th July, 2017 for setting aside the Ex-parte orders be and is hereby allowed.
- iii. The application for Judicial Review dated 14th February, 2017 be and is hereby struck off for being incompetent and bad in law.
- iv. The parties shall bear their own costs of the applications and entire suit.

Delivered, dated and signed this 11th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Orina instructed by E. M. Orina & Company Advocates for the respondent.
2. Mr. Omenya instructed by Munyao Muthama and Kashindi Advocates for the respondent.