



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 7 OF 2015

ABEDNEGO REUBEN OKARIKODI ETYANG'A.....CLAIMANT

VERSUS

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

CABINET SECRETARY,MINISTRY OF

INTERIOR & COORDINATION OF

NATIONAL GOVERNMENT.....2ND RESPONDENT

PRINCIPAL SECRETARY/INTERIOR

MINISTRY OF INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT.....3RD RESPONDENT

PUBLIC SERVICE COMMISSION.....4TH RESPONDENT

CHIEF OF STAFF & HEAD OF PUBLIC SERVICE.....5TH RESPONDENT

Mr. Oyuke for claimant

Mr. Oduor for respondent

RULING

1. The application by the claimant dated 27th July 2015 and the respondent's application dated 20th August 2015 were by agreement of the parties heard together. The parties have file replying affidavits, written submissions and list of authorities to the respective applications

2. In the amended notice of motion application dated 27th July 2015, the claimant sought interim orders granting a mandatory injunction compelling the respondents to reinstate the claimant to his position and office as a senior Deputy Secretary, Directorate of Immigration and Registration of persons Ministry of Interior and National Coordination of National Government pending hearing and determination of the suit.

3. The claimant applicant also sought reinstatement of the salary and allowances that were frozen following the claimants deletion from the payroll on the 7th May 2015.
4. The Court granted an exparte order directing the respondents to reinstate the claimant's pay from date of redeployment until further orders of the court on 27th July 2015.
5. The application is based on the grounds set out on the notice of motion and in the supporting affidavit of the claimant applicant.
6. The basis of the application may be summarized as follows;
7. That by a letter dated 17th April 2015, the 2nd and 3rd respondents arbitrarily and with malicious intent redeployed the claimant from the Ministry of Interior and Co-ordination of National Government to the Ministry of Agriculture, Livestock and Fisheries (State Department of Agriculture).
8. That the claimant wrote to the respondents challenging the legality of the transfer based on the rules and regulations that the claimant alleges were disregarded by the principal secretary Ministry of Interior and Co-ordination of National Government in redeploying and immediately sending the claimant to compulsory leave.
9. The claimant states that the principal secretary acted utravires her powers in that the Public Service Commission guidelines that took effect on 2nd December 2014 and dated 5th January 2015 clearly stipulates the procedure for transfer of officers of the claimant's job group under section 10.
10. That the claimant who has served Government diligently for a long time did not deserve the cruel treatment from the principal secretary without justifiable cause.
11. That the claimant was not given any chance to be heard and his constitutional rights were seriously violated. He was thrown out of office without notice an act that seriously demeaned and embarrassed him before his juniors.
12. That under section 10 of the Public Service Commission Guidelines, afore said, inter-ministerial transfers ceased and employees who wished to move from one ministry to another had to apply for vacant positions as and when advertised.
13. That posting of officers from one station to another in their substantive capacity within a ministry were to be undertaken by the respective cabinet secretary on recommendation of MHRMAC. This included deployment of staff from one state department to another within the same ministry.
14. In exceptional circumstances the central human resources management posting committee may recommend transfer of officers on job group 'Q' and above for approval by the Public service Commission.
15. Therefore both the cabinet and principal secretaries lack jurisdiction to transfer officers in job group 'Q' and above to other ministries.
16. That letters marked EA1 - E.A 13, clearly show this procedure was not followed and have material contradictions since the principal secretary irregularly sent the claimant on compulsory leave.
17. That no reasons were given for the redeployment in violation of the right to fair administrative action enshrined in Article 47 of the constitution.
18. On 13th August 2015, Hon. Lady Justice Monica Mbaru, ordered the respondents to obey the court order and that respondents file a reply to the application within seven (7) days and the matter be heard on 25th August 2015.

19. On 21st August 2015, the respondents filed an application for review of the orders issued on 27th July 2011 and 13th August 2015 in that the respondents were faced with practical difficulties in implementing the said orders.
20. That when the matter came up in court on the 7th July 2015 and subsequently on the 10th July 2015, 30th July 2015 and 13th August 2015, there was no order staying the claimant's transfer.
21. That the claimant's human resource department records and IPPD payroll data have since been transferred to the Ministry of Agriculture which should be his new pay point as a work station. That the claimant has not reported to his new pay point and work station.
22. That the 2nd and 3rd respondents / applicants no longer have control over the claimant's payroll data hence the difficulty in enforcing the orders herein.
23. The application is supported by affidavit of Amb. (Dr) Monica Juma, D.Phil. Mrs.
24. Counsel for the parties in the two applications made passionate oral submissions in support of the respective applications.

Determination

25. The issues for determination are as follows;

- i. whether the respondents are in wilful defiance of the orders of the court issued on 27th July 2015 and 13th August 2015, and if this be the case, the consequence of such defiance;
- ii. if the answer to (i) above is in the negative, whether the claimant in the application dated 27th July 2015 has satisfied the requirements of granting a temporary mandatory injunction pending the hearing and determination of the suit;
- iii. whether the respondents have in the application dated 20th August 2015 satisfied the requirements for review of the orders of the court dated 27th July 2015 and 13th August 2015.

Issue i & ii

26. The court is persuaded by the claimant that the Public Service Commission maintains an integrated payroll (IPPD) from which all civil servants draw their salaries and one can only be removed from the payroll if they have been terminated from employment.
27. It is common cause that the employment of the claimant / applicant was not terminated and there is no justification for removing him from the IPPD. The payroll is under control of the Director of Human Resource Management and Development as provided under Clause 2.1.6 (iv) of the Guidelines and should the terms thereof be abided, there should be no difficulty in reinstating the claimant to the payroll and pay his salary in obedience to the order of the court dated 27th July 2015 and reinforced on 13th August 2015.
28. The respondents are obliged to obey the orders of Nzioki wa Makau and Monica Mbau JJ issued on 27th July 2013 and 13th August 2015 respectively reinstating and paying the salary of the claimant from date of redeployment until further orders of this court are made.
29. The respondents have in the application for review dated 20th August 2015, sought to justify their failure to obey the court orders and wish to enlist the support of this court in their connivance to defeat the lawful orders of the court.

30. This court will not countenance such blatant disregard of its orders.

31. The 1st respondent, the Hon. the Attorney General is the principal legal adviser to the Government and under Article 156(6),

“The Attorney General shall promote, protect and uphold the rule of law and defend the public interest.”

32. It does not matter whether the orders of the court are right or wrong. A party against whom the orders of the court are directed must first obey the orders and then seek further relief from the court afterwards.

33. The respondents hastily removed the claimant from office after the court order dated 27th July 2015 was issued and now wishes to rely on that movement to justify inability to pay his salary in obedience to the court order that was in existence at the time.

34. Granted the lawfulness or otherwise of the said redeployment is the subject of this suit on the merits the court will desist from making any findings on the same at this stage of the hearing.

35. For the aforesaid reasons, the court finds that the application for review of the orders of the court dated 27th July 2015 and 13th August 2015, lacks merit on the basis that the alleged practical difficulties in implementing the said orders are self-inflicted and an affront on the orders and dignity of this court.

36. Indeed a party who wilfully defies an order of the court does not deserve to be granted audience by the same court for in his defiance he sets the rule of law into disarray and prepares the nation for such dire consequences this court does not wish to contemplate. A government party should be the last one to take such self-defeating action.

Issue iii

37. With regard to the question whether the claimant has satisfied the requirements for grant of a mandatory injunction, the court has had regard to the case of **Giella -Vs – Cassman Brown & Co. Ltd. [1973] EA 358** in which it was stated;

“first, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

38. On the first requirement, the claimant established a *prima facie* case that he was sent on compulsory leave by the 3rd respondent and his salary stopped unlawfully. The full merits of this matter will be determined upon hearing the case. However, the claimant persuaded the court that the balance of convenience favours the grant of the mandatory injunction.

39. The application by the claimant dated 27th July 2015 is successful and the court issues the following orders pending the hearing and determination of the suit;

i. the salary and allowances of the claimant that were frozen on 7th May 2015 be reinstated forthwith with effect from that date.

ii. that the respondents are restrained from interfering in any manner whatsoever with the claimant's appointment and or employment in the public service in job group R pending the hearing and determination of this suit.

iii. that the claimant continues to provide service in whatever capacity he will be deployed to subject to (ii) above pending the hearing and determination of this suit.

Dated and Delivered at Nairobi this 5th day of February 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE