



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 216 OF 2015

JOSPHINE WAMBURA GAKUO.....CLAIMANT/APPLICANT

VERSUS

KIRINYAGA WATER & SANITATION COMPANY (KIRIWASCO).....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 1st July, 2016)

RULING

The claimant filed the application by way of the notice of motion dated 11.04.2016 through Magee Wa Magee & Company Advocates. The application was brought under rule 16 (1), (3) and (4) of the Industrial Court (Procedure) Rules, 2010, section 5 of the Judicature Act, Cap 8 Laws of Kenya and all other enabling provisions of law. The claimant prayed for orders as follows:

1. That the Honourable Court be pleased to commit the respondent's Managing Director Njoka Muturi to prison for disobeying the court order issued on 25.11.2015.
2. That costs of the application be provided for.

The applicant's case is that the respondent has disobeyed the orders 2, 3, and 4 given by the court on 25.11.2015 and extended in presence of both parties on 03.12.2015. The orders were as follows:

1.
2. That an interim order is hereby issued that the transfer of the claimant from Kerugoya in the position of customer care officer to Ndia Mutithi (Kandongu) in the position of deputy area manager (commercial) as communicated to her vide the letter dated 6th November, 2015 is hereby deferred pending inter-parte hearing of the notice of motion dated 25th November, 2015 or until further orders of the court.
3. That an order is hereby issued restraining the respondent from demoting the claimant from the position of customer care officer (Job Group 4) to the position of deputy area manager (Commercial) pending inter-parte hearing of the notice of motion dated 25th November, 2015 or until further orders of the court.
4. That it is hereby ordered that the suspension given to the claimant and the anticipated disciplinary proceedings related to the claimant's objection to her unlawful demotion is hereby stayed pending inter-parte hearing of the notice of motion dated 25th November, 2015 or until further orders of the court.

The application was supported with the affidavit by the claimant filed together with the application and was based on the following further grounds:

1. That the respondent through its managing director Njoka Muturi proceeded to initiate other disciplinary proceedings upon substantially the same issues that are before the Court.
2. The applicant's advocates wrote to the managing director conveying that the intended actions were in contempt of court.
3. The applicant by its managing director nevertheless served the claimant with a notice of summary dismissal dated 8th January, 2016.
4. The respondent's actions were aimed at defeating the applicant's claim herein and curtailing her work as a shop steward of NUWASE.

On 2.12.2015 the parties' advocates attended court and the orders given were as follows:

1. The applicant to file supplementary affidavit and serve by 08.12.2015 and the respondent may file and serve further replying affidavit by 11.12.2015.
2. By consent mention on 10.03.2016 at 9.00am for further directions on the application or for recording a compromise on the application or entire suit.
3. The interim orders given on 25.11.2015 are hereby extended till the mention date or till further orders by the court.

The supporting affidavit shows that the cited managing director issued the notice to show-cause dated 22.12.2015. The notice stated that it had been noted that the claimant had been absent from work without permission on 12th November 2015 to 19th November 2015, 20th November 2015 to 27th November 2015, 7th, 8th, 9th, 10th, 11th, 16th, 17th, 18th, 21st, and 22nd December 2015 and the claimant was required to explain within 7 days why disciplinary action was not to be taken against him accordingly. The claimant replied by her advocates' letter dated 22.12.2015 as follows:

1. The period 12th November 2015 to 19th November 2015, 20th November 2015 to 27th November 2015, was subject to the suspension that had been imposed against the claimant and was subject of the proceedings in the present case.
2. For 7th, 8th, 9th, 10th, 11th, 16th, 17th, 18th, 21st, and 22nd December 2015 the claimant was at work except 9th and 10th when she applied for leave to attend some funeral of a first cousin and despite filling prescribed leave forms the managing director had given her a verbal permission; and on 22.12.2015 she had been at work and participated in the end of year party until at 3.15pm when she was served with the show-cause notice while on duty.

The respondent replied the advocates by the letter dated 29.12.2015 inviting the claimant to attend a disciplinary hearing on 05.01.2016 because the matters in the show-cause letter were outside the interim orders which had not lifted the contractual terms and conditions of employment between the parties such as the initiated disciplinary action.

The claimant's union wrote the letter dated 05.01.2016 objecting to the staff disciplinary committee hearing held on that date because the composition was allegedly defective, the allegations made were lies, and the CBA's prescribed disciplinary procedure had not been followed. The minutes of the hearing are filed and the record shows that the claimant exculpated herself as explained in her advocates' letter replying the show-cause letter. The summary dismissal letter dated 8.01.2016 then followed. The court is alert that whether the summary dismissal was lawful, fair or otherwise are matters to be determined after the full hearing of the suit.

The claimant urges that the respondent and its managing director violated the temporary orders by deploying one Susan W. Mbuco to the claimant's office to perform the claimant's duties. The claimant's case is that the contempt application should be allowed to protect her from harassment and unfair labour practices by the respondent.

The application has been opposed by the replying affidavit of Njoka Muturi filed on 13, 05.2016. The respondent's case is that the claimant could not explain her absence from duty between 7th to 11th December 2015 and 16th to 18th December 2015 as it was without leave or other lawful cause. The

respondent's further case is that by orders of 21.01.2016 the court stayed the summary dismissal communicated to the claimant by the letter dated 08.01.2016 pending hearing of the application the claimant had filed in that regard. By orders of 23.02.2016, those stay orders of 08.01.2016 were set aside pending hearing on 10.03.2016. On 10.03.2016 the court made several orders including that the claimant's application of 25.11.2015 had been overtaken by events, the claimant could file and serve amended claim to challenge the ensuing summary dismissal, and the claimant was granted leave to commence contempt application against the managing director, Njoka Muturi.

Parties have filed their respective submissions on the application for contempt against the managing director, Njoka Muturi. The court has considered the parties' respective cases and makes findings as follows:

1. The court finds that the managing director was at all material times aware of the court orders given on 25.11.2015 because even in the show-cause notice, he leveled allegations of absence from duty against the claimant including dates after 25.11.2015 showing that he considered that in view of the court orders of 25.11.2015, the claimant was supposed to be at work. The court considers that where the respondent in a contempt application is aware or informed of the court order, then the proceedings can be properly continued against such a respondent because there would be no reason to doubt that such a respondent knew and was bound to obey the order. In this case there is no reason to doubt that the respondent, the cited managing director, was aware and therefore had information about the court orders in issue.
2. The court observes that orders of 25.11.2015 related to stay of transfer and demotion and prohibited administrative disciplinary proceedings in view of the transfer, demotion and suspension that the claimant had questioned in the present case. The court further finds that the claimant has not, at this stage in the proceedings before court, showed that the notice to show cause leading to the disciplinary hearing and then the ensuing summary dismissal was directly or indirectly related to the transfer, demotion and the suspension that had been questioned and subject of the orders of 25.11.2015. In particular, the court has considered the respondent's replying affidavit in exhibit NM9, in the conclusion, where the respondent's staff disciplinary committee stated thus, **"The Committee observes that on the dates 12th to 19th and 20th to 27th Nov 2015 M/s Gakuo was away from duty on leave which she had applied but had not demonstrated any plausible reason as to why she had not ensured that the requisite approval was obtained before proceeding on such leave or seeking to extend the same. The committee further takes note of her response that this is a matter which is before a court of law and interim orders granted on 25th Nov 2015 which ordered a stay of the managing director's letter of 6th Nov 2016 suspending her transfer. Noting that the issue of her absence during this period although suspicious could however be intertwined with the dispute before the court and would therefore not dwell on it further."** That shows, in the opinion of the court, that the managing director had initiated a disciplinary process, in the findings of the committee, which partly included the dates after the orders of 25.11.2015 and therefore, in line with the court order, reckoned that the claimant was expected at work after the orders of 25.11.2015 as the managing director appears to have been concerned that despite the orders, the claimant was not at work.
3. The claimant has not showed, and the respondent has denied, that the appointment of Susan W. Mbuco to the position of Customer Care Officer was to take up the claimant's similar position or to replace the claimant in that capacity. Indeed, the court's opinion is that nothing stops an employer from establishing more than one office with a similar name and rank.
4. Thus, the court returns that the applicant (the claimant) has failed to establish the manner in which the respondent by itself or through the cited respondent's managing director disobeyed the court orders of 25.11.2016 and as had been extended by subsequent orders of 3.12.2015.

In conclusion the claimant's application by the notice of motion dated and filed on 11.04.2016 is hereby determined with orders as follows:

1. The application is dismissed with costs.
2. The parties are invited to take directions on the further steps in the suit.

Signed, dated and delivered in court at Nyeri this Friday, 1st July, 2016.

BYRAM ONGAYA

JUDGE