



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 236 OF 2016

(Formerly Cause 1853 of 2016 at Nairobi)

SAMUEL MAINA NJOROGE.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF EDUCATION.....2ND RESPONDENT

AND

**BOARD OF MANAGEMENT, THANGIRA UMOJA SECONDARY SCHOOL.....1ST
INTERESTED PARTY**

GRACE NJERI MWANGI.....2ND INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday, 18th November, 2016)

RULING

The 1st respondent (the applicant) filed an application on 10.11.2016 by the notice of motion dated 10.11.2016 brought under order 10 rule 11 of the Civil Procedure Rules, section 3A of the Civil Procedure Act, section 12 of the Industrial Court Act, and enabling provisions of law. The applicant prayed for orders:

1. That the application be certified as urgent and heard ex-parte in the first instance.
2. That the honourable court be pleased to set aside ex parte orders by Hon. Justice Nduma Nderi issued on 9th September, 2016.
3. The costs of the application to be provided for.

The application was based on the supporting affidavit by the learned counsel for the applicant Allan M. Sitima sworn on 09.11.2016 and attached on the application. Counsel for the applicant submitted as follows:

1. The applicant received allegations of professional misconduct against the claimant who at all material times served as the principal and administrator of Thangira Umoja Secondary School. The

claimant is employed by the applicant within the applicant's constitutional and statutory authority. In view of the allegations, the applicant interdicted the claimant by the letter dated 8.08.2016.

2. By the letter dated 08.08.2016 the applicant asked the claimant to hand over the school to a new principal.

3. The claimant being aggrieved by the applicant's decisions filed Judicial Review Application No.358 of 2016 in the High Court at Nairobi and Aburili J. granted some ex parte orders as was prayed for by the claimant. Subsequently the High Court heard the parties and on 01.09.2016 made a ruling. In the ruling it was found that the claimant had been interdicted before the applicant had been served with the ex parte orders; the case had changed from merely challenging the handover to challenging the disciplinary action namely interdiction; it was not just and fair and in the public interest to leave a school without any administration as that would lead to chaos; and thus the court exercised its discretion and lifted the orders of stay issued ex parte on 10.08.2016. The High Court further directed that the matter be placed before the Employment and Labour Relations Court which had jurisdiction to hear and determine the dispute under section 12(1) of the Employment and Labour Relations Court Act pursuant to the edit of Article 162(2)(a) of the Constitution. The respondent in those proceedings was directed to file and serve replying affidavits within 10 days and the matter to be mentioned on 05.09.2016 before the Employment and Labour Relations Court for further orders or directions as the Court may deem just and fit to grant.

4. The Judicial Review Application No. 358 of 2016 was not listed before the Employment and Labour Relations Court on 05.09.2016 as was directed and the applicant's case is that the file was not placed before a judge of the court as was directed.

5. The claimant without disclosing the material facts about the proceedings in Judicial Review Application No. 358 of 2016 filed the present suit and moved the court ex parte upon which Nduma J. gave orders on 09.09.2016 restraining the applicant from enforcing or proceeding with the interdiction and handover decisions.

6. The applicant's case is that the claimant obtained the ex parte orders of 09.09.2016 by deliberately misleading the court by concealing or failing to disclose the fact that the conservatory orders he was granted by the court on 09.09.2016 had been vacated by the High Court on 01.09.2016. Thus, it was urged for the applicant that the ex parte orders of 09.09.2016 were null and void ab initio.

7. The applicant relied upon **Peter Ng'ang'a Muiruri –Versus- F.M. Gikanga t/a Expeditious General Merchants & Another[2014]eKLR** (Kimondo J.) for the holding that the court has power to set aside ex parte orders where there has been material nondisclosure. In the present case, it was submitted that the claimant at the time he obtained the ex parte orders on 09.09.2016 did not make full disclosure of all relevant information in his possession and particularly about the pending Judicial Review Application No. 358 of 2016 and accordingly it was meritorious that the ex parte orders be set aside.

8. The applicant further submitted that the handover and interdiction had already taken place when the ex parte order was given on 09.09.2016 so that compliance with the ex parte orders was not possible. The applicant relied upon **Francis Mbuya Kinyoria –Versus- Nyasiongo Tea Factory and Another [2015]eKLR** (Karanja J.) for the holding that a plaintiff should not forge ahead to obtain orders and purport to serve them upon the defendants knowing too well that non compliance was a foregone conclusion as doing so was a clear demonstration of abuse of the court process on the part of the plaintiff.

The claimant opposed the application by filing his replying affidavit on 17.11.2016 through Kiarie Joshua & Company Advocates. It was urged and submitted for the claimant as follows:

1. Judicial Review Application No. 358 of 2016 that was before Aburili J. sought to challenge the

handover as conveyed to the claimant by the letter dated 08.08.2016.

2. Subsequently on 16.08.2016 the claimant was served with another letter dated 08.08.2016 conveying interdiction. That prompted the claimant to file another Judicial Review Application No. 377 of 2016 to challenge the interdiction.

3. In view of the findings by Aburili J. in Judicial Review Application No. 358 of 2016 on 01.09.2016 that the court with competent jurisdiction in the matter was the Employment and Labour Relations Court, the claimant opted to withdraw the two judicial review applications and decided to file the present suit and obtained the ex parte orders before Nduma J. on 09.09.2016.

4. The claimant had filed on 11.10.2016 an application for contempt seeking to enforce the ex parte orders and the applicant's present application was a careful calculation to frustrate or delay the contempt application.

5. Counsel for the claimant submitted that it was an invariable principle in law that ex parte orders obtained upon nondisclosure of material facts must be liable to setting aside.

The court has considered the submissions and makes findings as follows.

First, it is not in dispute that the claimant's contempt application was filed on 11.10.2016 and served on 14.11.2016. The application for setting aside the ex parte orders was filed on 10.11.2016. It is clear that after the application for setting aside had been served did the claimant move to serve the application for contempt. Thus, the court returns that the present application for setting aside the ex parte orders of 09.09.2016 cannot have been filed to frustrate or delay the application for contempt as was submitted for the claimant.

Second, the court has considered the initial pleadings in the present suit. The statement of claim was filed on 06.09.2016 and it has 30 paragraphs. Nowhere is it stated that there were previous proceedings between the parties namely Judicial Review Application No. 358 of 2016 and Judicial Review Application No. 377 of 2016. The court has also considered the notice of motion and the supporting affidavit filed for the claimant on 08.09.2016 and leading to the ex parte orders Nduma J gave on 09.09.2016. Nowhere is it mentioned that the parties had been involved in the previous proceedings namely Judicial Review Application No. 358 of 2016. Accordingly the court finds that the claimant is guilty of not make full disclosure of all relevant information in his possession and particularly about the pending Judicial Review Application No. 358 of 2016 and accordingly it is meritorious that the ex parte orders be set aside.

Third, on 01.09.2016 in Judicial Review Application No. 358 of 2016 Aburili J. discharged the interim orders staying the handover taking into account of the claimant's interdiction and in the considered view that it would be chaotic to leave the school without proper administration. The court finds that being aware of that binding decision by Aburili J. the claimant was not entitled to forge ahead to obtain the ex parte orders on 09.09.2016 in the present suit and purport to serve them upon the defendants knowing too well that non compliance was a foregone conclusion as doing so was a clear demonstration of abuse of the court process on the part of the claimant. It is clear that the sound directions by Aburili J. on 01.09.2016 in Judicial Review Application No. 358 of 2016 were not followed to the logical conclusion and there is no evidence on record to show that the Judicial Review Application was withdrawn as was otherwise submitted for the claimant - and the court finds that the failure to disclose in the initial pleadings in the present suit about that pending Application was yet another gross abuse of the court process.

Fourth, the affidavit of service of the ex parte orders given on 09.09.2016 is not on record. At paragraph 6 of the claimant's supporting affidavit attached on the application for contempt and filed on 11.10.2016 it is stated that the order was served on 13.09.2016. Assuming service was on the said 13.09.2016 and the application for setting aside was filed on 10.11.2016, taking into account the delay in the filing, the court returns that each party shall bear own costs of the application for setting aside rather than awarding the

costs in favour of the applicant.

In conclusion, the application filed on 10.11.2016 by way of the notice of motion dated 10.11.2016 is hereby allowed with orders as follows:

- a) The ex parte orders given by the court on 09.09.2016 by Nduma J. are hereby set aside.
- b) Each party to bear own costs of the application.

Signed, dated and delivered in court at **Nyeri** this **Friday, 18th November, 2016.**

BYRAM ONGAYA

JUDGE