



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 18 OF 2016

DR. EVANS MUMO MWANGANGI.....CLAIMANT

VERSUS

KITUI COUNTY SERVICE BOARD.....1ST RESPONDENT

COUNTY SECRETARY, COUNTY GOVERNMENT OF KITUI.....2ND RESPONDENT

AND

ALEX KIMANZI.....1ST CONTEMNOR

ROSE KAVATA MASYA.....2ND CONTEMNOR

FREDRICK MULI.....3RD CONTEMNOR

RULING

Introduction

1. On 31st May 2016 I delivered a ruling in favour of the Claimant in the following terms:

- a. The Claimant's interdiction is hereby quashed;
- b. The Claimant is reinstated to his position without any loss of pay or benefits;
- c. The Respondents will pay the costs of the application.

Contempt Application

2. The Claimant then came back to Court by way of Notice of Motion dated 22nd July 2016, claiming that the aforesaid orders had not been complied with.

The Claimant's application, which is supported by his own affidavit sworn on 22nd July 2016 seeks the following orders:

- a. That the Court issues summons to Alex Kimanzi, the Acting County Secretary, Kitui County,

Rose Kavata Masya, the Kitui County Public Service Board Chairperson and Fredrick Muli, the Acting Chief Officer and Deputy Director of Health Services (the Contemnors) to show cause why they should not be punished for contempt of court;

b. That the said Contemnors be cited for contempt of court and be detained in prison for a period of six (6) months or for such period as the Court shall deem necessary;

c. That in addition to or in lieu of such committal, the Court be pleased to order the sequestration of the properties of the said Contemnors;

d. That the Contemnors bear the costs of the application.

3. The application is based on the following grounds:

a. That Alex Kimanzi, the Acting County Secretary, Kitui County, Rose Kavata Masya, the Kitui County Public Service Board Chairperson and Fredrick Muli, the Acting Chief Officer and Deputy Director of Health Services have continued to disobey the orders of the Court;

b. That the Court delivered its decision on 31st May 2016 by which it quashed the Claimant's interdiction and ordered that he be reinstated to his position without loss of pay or benefits;

c. That contrary to and in breach of these orders, the Respondents and the Contemnors declined to reinstate the Claimant to his position without loss of pay or benefits, declined to allow the Claimant access to his office and failed to pay his salary and allowances as ordered by the Court;

d. That the Contemnors, having come to Court on 19th July 2016 pursuant to summons to appear, purported to purge the contempt by stating that they had dispatched a letter to the Claimant reinstating him and were working on his salary and benefits. The Claimant was however yet to receive the said letter and had not received communication on the payment of his salary and benefits;

e. That the Claimant has been asked to report to Fredrick Muli who has taken over his position as Acting Chief Officer;

f. That the County Secretary, Alex Kimanzi has written to the Claimant instructing him to proceed on a 45 days' annual leave without any reasonable grounds;

g. That this amounts to sending the Claimant on compulsory leave which is a disciplinary measure in the public service thereby returning the Claimant to the position of interdiction;

h. That the Claimant went to Alex Kimanzi's office on 20th and 21st July 2016 but Kimanzi refused to facilitate his reinstatement;

i. That Fredrick Muli has declined to hand over the Claimant's office back to the Claimant and continues to operate within the office carrying out the functions to be carried out by the Claimant.

4. In the supporting affidavit sworn by the Claimant on 22nd July 2016, he depones that he was yet to receive the letter reinstating him to work. He had however gone back to work pursuant to a copy of the letter presented to the Court but was told to report to Fredrick Muli to whom he had handed over the position of Acting Chief Officer and Deputy Director which he construed to mean that the Respondents were not willing to reinstate him to the position he held before interdiction.

5. The Claimant further depones that Alex Kimanzi had, without any reasonable ground, written a letter instructing him to proceed on 45 days' annual leave.

According to the Claimant, Alex Kimanzi was sending him on compulsory leave thereby returning him to the position at interdiction.

6. The Claimant states that he had taken his accrued leave for 2014/2015 and had been away from work on interdiction for the entire leave year 2015/2016. Moreover, in accordance with Clause H.4 of the Human Resources Manual which provides that leave must be taken within the leave year it falls due, the said leave days had been forfeited.

The Contemnors' Reply

7. In a replying affidavit sworn by Alexander Kimanzi who is the Acting County Secretary for County Government of Kitui and the 1st Contemnor in this application, it is deponed that following the order of the Court issued on 31st May 2016, the County Government of Kitui issued a letter dated 15th July 2016 terminating the Claimant's interdiction.

8. Kimanzi states that on 18th July 2016, he personally took the letter dated 15th July 2016 to G4S Courier Services offices in Kitui Town to be delivered to the Claimant. He adds that the Branch Manager for G4S, a Mr. Wambua called the Claimant in his presence and asked him to either pick the letter or state the nearest G4S Courier Services office where the letter could be delivered.

9. The Claimant, who had been put on speaker phone, retorted that the County Government should look for him in Nairobi. He declined to provide his forwarding address. Kimanzi left the letter at the G4S Courier Services office and was issued with a receipt.

10. Additionally, a copy of the letter of 15th July 2016 was handed over to the Claimant's Counsel by the Respondent's Counsel on 18th July 2016. Another copy was produced in Court on 19th July 2016.

11. Kimanzi further depones that following his reinstatement, the Claimant reported back on duty on 20th July 2016. By the letter of reinstatement, the Claimant was informed that the County Government was working on his payments and that he would be notified in due course when the payments were ready. The withheld salary and monetary benefits had since been worked out and paid to the Claimant. His name had also been restored on the payroll.

12. Regarding the issue of the Claimant being sent on leave soon after reinstatement, Kimanzi states that the County Government's leave cycle which runs from 1st July to 30th June is regulated by both the County Public Service Human Resource Manual, 2013 and the Public Service Commission Human Resources Policies and Procedures Manual.

13. These Regulations provide that annual leave is a right to every public officer and is granted for recuperative purposes to enable the officer renew their energies and improve efficiency. Leave is granted by the employer subject to the exigencies of service. Further, the law makes annual leave a mandatory entitlement to an employee.

14. The Claimant was employed on 1st January 2014 and his annual leave entitlement was stated as follows:

a. For the leave year 1st July 2013 to 30th June 2014, the Claimant carried forward 5 leave days to the following leave year;

b. For the leave year 1st July 2014 to 30th June 2015, he earned 30 days leave plus the 5 days carried forward from the 2013/2014 leave year giving him an entitlement of 35 days. He utilized 6 days during that leave year leaving a balance of 29 days but in accordance with the Regulations, he could only carry forward 15 days to the following year;

c. For the leave year 1st July to 30th June 2016, the Claimant earned 30 days leave plus the 15 days carried forward giving a total of 45 days to his credit.

15. During the leave year 2015/2016, the Claimant could not proceed on leave because he was on interdiction and the Regulations provide that during this period he could only receive half of his salary and full house allowance but other benefits were withheld. One such withheld benefit was entitlement to annual leave.

16. Kimanzi states that as per the order granted by the Court on 31st May 2016, the County Government had an obligation to grant the Claimant the 45 days' leave earned and he was granted those days.

17. According to Kimanzi the Contemnors should not be cited for contempt merely because the Claimant's employer, the County Government of Kitui, which is not a party to these proceedings granted the Claimant annual leave which was the Claimant's contractual right, a benefit restored by the Court.

18. Kimanzi maintains that the Claimant remains reinstated in the position of Deputy Director, Health Services which is the substantive position he held prior to his interdiction.

Findings and Determination

19. The issue for determination in this application is whether Alex Kimanzi, the Acting County Secretary, County Government of Kitui, Rose Kavata Masya, the Kitui County Public Service Board Chairperson and Fredrick Muli, the Acting Chief Officer Health Services have disobeyed the orders of this Court granted on 31st May 2016 thus rendering themselves guilty of contempt of court.

20. Black's Law Dictionary (Ninth Edition) defines contempt of court as:

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

21. The full effect of the orders granted by the Court on 31st May 2016 was to reinstate the Claimant to his position without loss of pay or benefits. As occasionally happens in litigation, the meaning of these rather common place terms in employment law and practice have generated unforeseen controversy. So what did the subject orders actually mean?

Reinstate to Which Position?

22. Black's Law Dictionary (supra) defines the verb to reinstate as: *“to place again in a former state or position; to restore”*

23. Pursuant to the orders of the Court the County Government of Kitui wrote the following letter dated 15th July 2016:

“Dr. Evans Mumo Mwangangi

Dear Dr. Mumo,

REF: ELRC CAUSE NO. 18 OF 2015(SIC)

YOURSLEF – VS- KITUI PUBLIC SERVICE BOARD AND ANOTHER

We refer to the above matter and to the Orders made by the honourable court on the 31st May, 2016 reinstating you to your position without loss of payment or benefits.

We write to confirm full compliance with the said Orders by withdrawing our letters of interdiction

and dismissal. You may report to your work station with immediate effect.

We are also working out your payments as you know this takes time and you shall be notified in due course.

Yours faithfully,

Alex Kimanzi

Ag. COUNTY SECRETARY

24. It is not in contest that at the time he was interdicted the Claimant held the substantive position of Deputy Director, Health Services and was also Acting Chief Officer. It seems to me that the controversy on this account arises from the question whether by the orders of the Court, the Claimant was reinstated to both his substantive position as well as the acting position. In order to answer this question the Court must make a determination on the extent of the remedy of reinstatement.

25. In the normal scheme of things, an employee will seek reinstatement as a remedy to an unlawful termination of a substantive appointment. I do not therefore see how an acting appointment, which is ordinarily effected by management in the interim, can be assumed via an order for reinstatement.

26. The result of this conclusion is that the failure to restore the Claimant to the position of Acting Chief Officer cannot be said to have been in contravention of the order of the Court issued on 31st May 2016. Logically, this discharges Fredrick Muli who occupies this position from any contempt of court charges.

27. Regarding the issue of service of the letter of reinstatement on the Claimant, the only thing I will say is that there is adequate evidence that genuine attempts were made to deliver the letter to the Claimant. At any rate, the Claimant was aware of the existence of this letter whose copy was availed to the Court and to his Advocate.

Payment of Salary and Benefits

28. The Claimant also complains that he has not been paid his full salary and benefits as ordered by the Court. However, no evidence was produced to prove the specific amounts unpaid and the Court was unable to assign any wrong on this account.

29. In light of the foregoing, I must also discharge the Kitui County Public Service Board Chairperson, Rose Kavata Masya from any charges of court contempt of court.

Instruction to Proceed on Leave

30. I will now deal with the controversy surrounding the letter dated 20th July 2016 which sent the Claimant on leave soon after reinstatement. The letter states as follows:

“Dr. Evans Mumo Mwangangi

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The Ag. Chief Officer

County Ministry of Health and Sanitation

ANNUAL LEAVE

Records held in this office reveal that you have unutilized annual leave days totaling to forty five (45) for the 2014/2015 and 2015/2016 Financial Years.

Consequently, **you are directed** to proceed on your 45 days annual leave for the two Financial Years **with immediate effect**. Kindly ensure that you complete the relevant leave application form before proceeding on leave. [Emphasis added]

Alex Kimanzi

Ag. COUNTY SECRETARY

31. Extensive arguments were made on the Claimant's leave balance position but I think the important question is not whether the Claimant had leave days to his credit but rather whether the action of sending him on leave in the wake of his reinstatement was a violation of the orders granted by this Court on 31st May 2016.

32. Annual leave is an entitlement for every employee as provided under international and municipal law. Specifically, Article 3 of the Holidays with Pay (Revised) Convention, 1970 (No. 132) secures a minimum of three working weeks for every year as annual leave. In similar vein, Section 28(1) of the Employment Act, 2007 provides for a minimum of 21 days' leave with full pay after every twelve consecutive months of service.

33. The question then is whether leave that is imposed on an employee for whatever reason still remains leave in the normal course of employment. Counsel for the Claimant referred the Court to Section 28(2) and (5) of the Employment Act which provide as follows:

2. An employer may, with the consent of the employee divide the minimum annual leave entitlement under sub-section (1)(a) into different parts to be taken at different intervals.

5. Where in a contract of service an employee is entitled to leave days in excess of the minimum specified in subsection (1)(a), the employer and the employee may agree on how to utilize the leave days.

34. Counsel also made reference to Article 10 of the Holidays with Pay (Revised) Convention, 1970 (No. 132) which provides that the scheduling of annual leave is to be determined by the employer after consultation with the employee.

35. The gist of these provisions is that annual leave is taken voluntarily by the employee with concurrence by the employer and this was the holding by **Rika J** in ***David Wanjau Muhoro v Ol Pejeta Ranching Limited [2014] eKLR***.

36. The Contemnors argue that the order of reinstatement without loss of pay and benefits included accrued leave hence the decision to send the Claimant on leave. This argument begs the question as to why the Claimant was not consulted in the scheduling of his leave. In my view, letter dated 20th July 2016 is a terse instruction to the Claimant to proceed on leave. I do not think this is the way ordinary annual leave is taken.

37. This Court has therefore arrived at the conclusion that by issuing the letter dated 20th July 2016, the 1st Contemnors, Alex Kimanzi violated the orders granted on 31st May 2016. To this extent I am persuaded by the holding by **Rika J** in ***Catherine Mwihiaki Ngambi v Maths Trading Company Limited [2014] EKL*** that reinstatement does not mean mere payroll reinstatement.

38. The Claimant in this case is a Medical Doctor holding a senior position in the County Government of Kitui and it cannot be that by merely restoring him to the payroll and then sending him on leave, he has been reinstated. Employment is more than money and for professionals such as the Claimant, the opportunity to practice in the workplace plays a crucial role in their career progression.

39. More importantly, given the history of this case which is littered with multiple allegations of

contempt, and the patience exercised by the Court, there ought to have been more caution on the part of the Contemnors. Specifically for Alex Kimanzi, who was right at the centre of the controversies in this case, a letter sending the Claimant on leave soon after reinstatement ought to have been anathema.

40. In *Vincent Edward Njoroge & Others v Kenol Kobil Limited [2014] eKLR* this Court held that a key function of leaders and managers of institutions is to ensure compliance with court orders. It cannot be then that it is those leaders and managers who violate these orders.

41. As held in *Wildlife Lodges Ltd V County Council of Narok and Another [2005] 2EA 344*, if for any reason a party is unclear about the import of a court order, there are avenues for interpretation or review before the issuing court and if a party is dissatisfied with the order altogether, there is an avenue for appeal to a higher court. Defiance whether overtly or covertly is never an option.

42. In demonstrating the seriousness of instances of contempt of court in *Mutitika v Baharini Farm Limited [1985] KLR 229, 234* the Court of Appeal stated that anyone who does anything that flies in the face of a court order obstructs justice and must be punished.

43. I have carefully considered the letter dated 20th July 2016 issued to the Claimant by Alex Kimanzi and have arrived at the conclusion that the said Alex Kimanzi knowingly and willfully violated the orders of the Court granted on 31st May 2016 and hereby cite the said Alex Kimanzi for contempt of court.

44. Consequently, I direct that Alex Kimanzi shall pay a fine of Kshs. 1,000,000 (read One Million Kenya Shillings) and in default the said Alex Kimanzi shall be committed to civil jail for a period of thirty (30) days. This penalty takes effect immediately.

45. I further direct that the contempt herein be purged forthwith.

46. The costs of this application will be met by the 1st Contemnor, Alex Kimanzi.

47. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF NOVEMBER 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Gumbo with Mr. Wanjala for the Claimant Mr. Obura for the Contemnors