



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1547 OF 2011

FRANCIS MWELEMI SIMEON.....CLAIMANT

VERSUS

ENGLISH PRESS LTDRESPONDENT

Claimant/Applicant in person

Mr. Masese for Respondent

RULING

Application dated 25th May, 2014 and filed on the same date seeks for an order in the following terms;

1. That the Respondent jointly and/or severally attend court to show cause as to why they cannot be convicted for contempt of court by willfully failure to honour the specific performance of the reinstatement ordered by the court in the Judgment delivered on 14th March, 2014 and the decree thereof issued on 4th April, 2014.
2. That the Respondent jointly and/or severally show cause why the Decree issued on 4th April, 2014 should not be executed.
3. The Application is based on the grounds set out in the Notice of Motion indicating the Respondent was directed to;
 - (i) Reinstatement the Claimant/Applicant to his previous job
 - (ii) Pay the Claimant/Applicant arrears salary by fact of reinstatement less benefits already paid and cheque already received
 - (iii) Apply the rest of arrears to repay the loan with Barclays Bank; and
 - (iv) Pay cost of the suit.
4. The Application is further supported by the Affidavit of the Claimant Francis Mwelemi Simeon sworn on 26th May, 2014 wherein he states that;

- (i) he served the decree on 4th April, 2014 upon the Executive Director, Federation of Kenya Employers(FKE) the representatives of the Respondent
- (ii) that he has since waited for reinstatement to date
- (iii) on 13th May, 2014, he received the Bank loan clearance letter dated 12th May, 2014
- (iv) that the purported letter of reinstatement was not served on him
- (v) That he also did not receive the show cause notices dated 5th May, 2014 and 12th May, 2014 respectively
- (vi) That he saw the documents in the court's file and by so doing Federation of Kenya Employers aided the Respondent in avoiding to obey the court order.

5. **Response**

The Respondent filed a Replying Affidavit of Sylvia Mirenje chegero sworn on 20th August, 2014.

6. The Deponent is the Human Resource Manager of the Respondent. She states as follows;

- (a) The Claimant failed to avail himself for reinstatement and assignment of duties and by so doing frustrated the execution of the decree by the Respondent.
- (b) The Respondent repaid the outstanding Bank loan in compliance with the court order and this in itself is evidence of good faith on the part of the Respondent.
- (c) That all letters written to the Claimant were sent to his address of service as displayed in his pleadings and certificate of posting are annexed and marked 'SMC'.
- (d) That in court, on 9th June, 2014, the parties agreed that the Claimant should report back to work on 10th June, 2014 and the Claimant did.
- (e) That since the Claimant had failed to report to work since March, 2014, the Respondent proceeded with the disciplinary proceedings as per the notice to show cause letter dated 11th June, 2014 on page 14 marked 'SMC'.

7. That the Claimant responded to the notice to show cause letter on 14th June, 2014 and his reply is marked 'SMC' on page 15 – 16.

8. That the Claimant denied ever having received the letters for reinstatement and earlier show cause letters but admitted having received a letter dated 26th May, 2014 by registered post via the same address used in posting all the other letters referred to earlier.

9. That the Claimant is not being candid with the court.

10. That this Claimant was invited to attend a disciplinary hearing vide the letter of 23rd June, 2014 and same was copied to his Union's Branch Secretary and Shop Steward.

11. That on 27th and 28th June, 2014, the Claimant was taken through a disciplinary hearing minutes of which are annexed on pages 19 – 22 and marked 'SMC'.

12. That on 28th June, 2014 the Claimant appeared at the disciplinary hearing with a 'sick-off' note by a 'Dr. Keller'.

13. The Claimant was expected to table his evidence on the day.

14. The Respondent was suspicious of the sick-off note and opted to verify its authenticity and the Claimant was requested to attend at Avenue Health Care Clinic for a 2nd opinion. The company Doctor, Wangai established that the status of the Claimant did not tally with the sick-off sheet dated 28th June, 2014 from M.C. Health Lane.

15. That the Respondent sent one Victor Komu to the MC Health Lane, Buru Buru Branch to investigate the authenticity of the sick-off note provided by the Claimant.

16. That the clinic provided Victor Komu with a similar sick-off note for the same sickness and similar treatment and a rest prescribed for 2 days off. The same is annexed on page 25.

17. It is clear that these sick-off notes were fraudulent and were gotten by the Claimant for the sole purpose of evading the disciplinary process on 28th June, 2014.

18. The Respondent concluded the disciplinary hearing and summarily dismissed the Claimant by a letter dated 3rd July, 2013 which appears on page 26 – 27 and marked ‘SMC’.

19. The Respondent thereafter wrote to the Pharmacy and Poisons Board dated 17th July, 2014, citing the conduct of the said Dr. Keller and his collusion with the Claimant to issue a fake sick-off note.

20. The Ronald Ngala Street Post Office where the letters sent to the Claimant were posted from confirmed that indeed all the posted letters were collected and documentary evidence appears on page 30-36 marked ‘SMC.’

21. **Determination**

The court is satisfied that the Claimant did not facilitate the execution of the court order. That the Respondent did all it could in the circumstances to comply with the court order.

22. The Claimant/Applicant has come to court with dirty hands and cannot therefore receive the assistance of the court.

23. The Claimant has since been dismissed from his employment. The lawfulness or otherwise of this dismissal can only be the subject of another suit, if the Claimant chose to pursue the matter.

24. The Application seeking to punish the Respondent for contempt of court is dismissed with costs.

Dated and Delivered at Nairobi this 13th day of February, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE