



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 144 OF 2014

CHARLES KINYUA.....1ST CLAIMANT

LAWRENCE KINOTI M'ITONGA.....2ND CLAIMANT

VERSUS

MERU CENTRAL DAIRY CO-OPERATIVE UNION LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th October, 2015)

RULING

The court delivered the judgment in the suit on 31.07.2015. In that judgment the court entered judgment for the claimants against the respondents for orders:

- a. That the termination of the claimants' employment by the respondent was unfair.
- b. The claimants are re-engaged with effect from 1.08.2015 in the employment of the respondent in the respective positions they held at termination with the terms of service prevailing as at date of this judgment and the period between date of termination 15.11.2011 to 1.08.2015 be treated as leave without pay so that there shall be no break in the claimants' service for purposes of pension, service pay, gratuity or such other retirement or terminal benefits.
- c. In view of order (a) and (b) the claimants shall report to the respondent's chief executive officer for appropriate deployment on 3.08.2015.
- d. The respondent to pay each of the claimants **Kshs. 20,000.00** by 1.09.2015 being costs of the suit in default interest at court rates to be payable thereon from the date of this judgment till full payment.

The claimants acting in person filed on 02.10.2015 the notice of motion seeking substantive orders as follows:

- a. That the honourable court be pleased to commit and detain the chairman Meru Central Farmers Co-operative Dairy Union Limited in prison for such reasonable period not exceeding six months for having disobeyed court order of 31.07.2015.
- b. That in the alternative the honourable court is pleased to employ any other reasonable measures so as to enforce compliance of its orders by the respondent.

c. The respondent to meet the costs.

The application was based on the following grounds:

a. The respondent has disobeyed orders issued on 31.07.2014 to re-engage the claimants back to employment.

b. The respondent on 3.08.2015 served the claimants with letters and told them to report to their departmental head for deployment. On the same date the respondent instructed the claimants to apply for annual leave to commence on 5.08.2015 and end on 15.09.2015 and the claimants complied accordingly.

c. The claimants reported at work on 16.09.2015 and they were served with termination of employment letters on grounds of redundancy. The ground for redundancy was that the position of watchman had become redundant.

d. At the time of the first termination the 1st claimant was working as effluent attendant and the 2nd claimant as a gate-keeper. It was therefore untrue that they would be rendered redundant on account of abolished watchman position. The redundancy letters were therefore null and void.

e. The honourable court has teeth and should be able to enforce compliance of its orders as it was in the interest of justice that the orders now sought are granted.

The respondent opposed the application by filing on 19.10.2015 the replying affidavit of Fridah G. Mbaya. The respondent has urged as follows:

a. That following the judgment the claimants were reinstated as ordered, they were paid costs as ordered, and were paid all salaries that fell due after re-instatement and before termination on account of redundancy. The judgment and decree having been fully satisfied, the court is *functus officio*.

b. That the claimants were initially employed as watchmen as per the letters of appointment. The 1st claimant was then deployed as effluent attendant while for 2nd claimant, “gate-keeper” is the other name for watchman.

c. The respondent has outsourced security services and abolished the establishment for watchman.

The court has considered the submissions and the material on record and makes findings as follows:

1. The orders in the judgment were that the claimants were re-engaged and were to be paid costs as ordered in the judgment. Taking all material on record into account, the court finds that the respondent complied with the orders to re-engage and to pay the costs.

2. The claimants’ dispute in the present application is that subsequent to the re-engagement the respondent decided to declare them redundant. The court considers that an order for re-engagement or for reinstatement does not bar an employer from exercising human resource powers and functions over the employee so reinstated or reengaged. Thus the employer is at liberty to exercise such human resource powers and functions over the employee including as relates to disciplinary control, redundancy, leave, performance management, retirement, transfer or redeployment and such other functions and powers. The overriding consideration is that the employer will exercise and discharge the human resource functions and powers in accordance with the law and the agreement between the parties. In the opinion of the court, if the reinstated or reengaged employee is dissatisfied with any decision or manner of exercise of any of the human resource functions and powers by the employer after such reinstatement or reengagement, such dissatisfaction would constitute a new cause of action.

3. The court upholds its opinion in a similar case in the ruling of 08.05.2015 in **Cecilia Wangechi Ndungu –Versus- The County Government of Nyeri and Another [2015]eKLR** thus, “As submitted for the respondents, the applicant’s concerns would be best canvassed at a full hearing in a suit

filed for the applicant in that behalf. In making that finding, the court considers that as submitted for the applicant it would be necessary to make full investigation into the lawfulness of the 2nd respondent's action of reorganising the county government. Thus as things stand, that particular issue remains unresolved. It will be open for the applicant to file appropriate legal proceedings for that purpose as the applicant may deem appropriate." Thus, the court's opinion is that it is open for the claimants to file a fresh suit to question the lawfulness of the redundancy and to urge all the issues in dispute and pray for appropriate remedies.

4. Nevertheless, the claimants appear to raise two pertinent issues that would fall for determination if they were to file a fresh suit in that behalf; first is whether the offices they were reengaged into have been abolished, and second, whether the respondent has followed the redundancy procedure as provided for in section 40 of the Employment Act, 2007 and as agreed between the parties. The court would want to trust that the respondent is a responsible and law abiding employer and will seek to address and resolve the dispute amicably without there being necessity of the claimants to move this court in a fresh suit. In that view, the court encourages the parties to negotiate and amicably resolve the grievances. In that spirit of the court's encouraged compromise, each party shall bear own costs of the application.

In conclusion, the claimants' application dated 1.10.2015 is dismissed with orders that each party shall bear own costs of that application.

Signed, dated and delivered in court at Nyeri this Friday, 30th October, 2015.

BYRAM ONGAYA

JUDGE