



IN THE REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 128 OF 2011

CHARLES MUTURI MWANGI CLAIMANT

VERSUS

INVESCO ASSURANCE CO. LTD RESPONDENT

RULING

1. This is a ruling with regard to the claimant's application dated 5th August 2013 filed by Chamber Summons under rule 3(1) and (2) of the High Court Practice Procedure Rules of the Judicature Act and section 3, 4, 12 of the Industrial Court Act and all other enabling provisions of the law. To the Chamber Summons is attached a Notice of Motion. The application is seeking the release of the uncontested four (4) month's salary owed to the claimant by the respondent pending the hearing of the other claims. This application is supported by the annexed affidavit of Jacob Auma Okoth, the claimant's advocate. On 16th August 2013, the claimant Charles Muturi Mwangi, filed a Further Affidavit. A List of Authorities dated 15th August 2013 was filed by the claimant on 16th August 2013 and another List filed on 23rd September 2013. To this application the respondent filed a Notice of Preliminary Objections dated 12th August 2013, a Replying Affidavit sworn by Rosemary Okumbe dated 13th August 2013. On 20th August 2013, the respondent filed another Replying Affidavit sworn by Paul Gichuhi. This application was heard on 19th December 2013.
2. The claimant based his application on the grounds that his children have been sent out of school for failure to pay school fees totaling to four terms and by virtue of the fact that his savings are exhausted and has no job he cannot adequately cater for his family's need a setback that could see his hitherto peaceful and whole family disintegrate and fall apart as he cannot sustain the family. That at the time of the claimant's suspension from duty by the respondent in the year 2007 he had not been paid for 4 months, which was pleaded in his claim and in reply this has not been rebutted, counter-claimed or denied. Since the claimant's suspension, no investigation report has been issued to him or a hearing held where he was summoned or invited nor has there been a letter exonerating the claimant from the serious allegations made against him by the respondent leaving a permanent tag on his conduct and as such cannot secure any job from would be potential employers. The claimant has been rendered destitute, the matter has dragged on for 6 years hence the need to salvage the situation by having the court direct that the respondent do remit to the claimant 4 month's salary that is not contested.
3. Other grounds as in the Notice of Motion are that the suit was filed in 2011 by which time the claimant had not been paid his salary of 4 months, since then there has been several applications filed herein with the matter going before an Arbitrator and then to the High Court which referred the matter back to the Industrial Court forcing the claimant to put up with harsh conditions due to the unpaid salaries. The claimant has been forced to borrow money from friends and relatives to sustain his family as he has exhausted his savings and since there were uncontested salaries due for the months of September 2006, October 2007, November 2007 and December 2002 all

- amounting to Kshs.2,830.00 being unpaid salary for September 2006, October 2007, November 2007 and December 2002 amounting to Kshs.1,600,000.00; leave allowances for September 2006, October 2007, November 2007 and December 2002 amounting to Kshs.800,000.00; fuel allowances for 4 months amounting to Kshs.370,000.00; and mobile fee allowances amounting to Kshs.60,000.00. That there has been no hearing or investigations conducted by the respondent with regard to the claimant employment with them contrary to section 41 and 43 of the Employment Act and thus the prayers sought to enable the claimant pay school fees for his children and meet other basic needs for his family.
4. To this application the claimant gave his Further Affidavit noting the Preliminary Objections raised by the respondent stating that there were salary arrears due to him from the respondent, the respondent had failed to file a defence to the claim herein and the defence placed on record was filed unprocedurally without leave of the court and should be struck out. That there has been a plethora of applications in this file but on 7th June 2013 the court allowed the claimant to amend the claim to which there is no appeal. The claimant had a memo with regard to the non-payment of his salaries dated 13th January 2007 and the burden now rests on the employer to show that these salaries were paid which is not the case here. These uncontested salaries should be paid as the other claims await arbitration.
 5. In response, the respondent through the replying affidavit of Rosemary Okumbe, the Deputy Company Secretary, stated that the claim herein commenced as Industrial Cause No. 128 of 2010 where the claimant was seeking Kshs.10, 980,000.00, it was referred for arbitration by consent, and there was an appeal to the High Court which was later referred back to the Industrial Court. In an application dated 19th March 2013, the claimant made similar prayers as in this application and parties agreed to have a full hearing. That this application is now seeking piecemeal litigation against the spirit of what the parties had agreed to and amounts to res judicata. The claimant applied to amend the pleadings which were granted and the respondent applied to lodge an appeal but the court file has been missing.
 6. Rosemary further states that the claimant is seeking for the payment of an amount said to be uncontested but the issues should proceed to full hearing as a defence was filed on 16th March 2012 when the matter was before arbitration, an Amended Statement of Defence was filed together with a Counter-claim and thus the suit is opposed and the application should be dismissed with costs tot eh respondent.
 7. Paul Gichuhi, the Respondent's claims manager also filed his replying affidavit in support of the averments made by Rosemary Okumbe and stated that the claimant was summarily dismissed for gross misconduct and fraud on 14th December 2007, the claim is disputed since 2011 when the claimant was seeking payment for unlawful termination. That there are no owing salary arrears to the claimant and if there are, this is a matter of proof that can only be canvassed at a full hearing And the claim cannot be assessed before a full hearing. The application is meant to prejudice the respondent's case and by the claimant using his family circumstances to make his application, he is only seeking the sympathy of the court to rule in his favour.
 8. Paul further stated that there are several other claims in this court against the respondent after the respondent went under receivership, on 9th February 2010 there was a re-launch and has since been inundated with from former employees, amongst other claims, which could unfairly and detrimentally degenerate and or escalate the debt portfolio of the respondent thereby diminishing any possibility of its recovery and rendering it a shell. Thus the claimant's application is premature and incapable of being separated from the rest of the matter without perusing evidence in support thereto.
 9. In submissions, the claimant advocate in support of the application stated that the unpaid salaries amounting to Kshs. 2,830.00 should be released tot eh claimant by the respondent. These were amounts earned and owed to the claimant and should be immediately released. Despite the claimant not being paid his dues salaries, he was sent on suspension and now is 6 years since. The c claimant's arguments are based on several authorities especially the case of *Pitus Omeri versus Bob Morgan Services Ltd (2013) eKLR* where the court held that section 20 of the Employment Act, employers are expected to provide itemized statement to employees and to keep all employee records. In this case the respondent failed to discharge this duty with regard to the claimant. Under section 10 and 20 of the Employment Act, owed salaries should be paid to an employee and in this

- case, the respondent has not shown any documents as proof of such payment with regard to owed salaries for September 2006, October 2007, November 2007 and December 2002 amounting to Kshs.2,830,000.00. That the claimant's contract with the respondent provided for a salary of Kshs.400,000.00 per month with leave allowances which all amount to the claimed amounts.
10. The claimant further submitted that there was no explanation as to how the claimant received a disjointed salary but that where an employee is at work and does not receive pay, the same remains owing and an entitlement. In *Paul Mwaura Mbugua versus Kagwe Tea Factory Ltd and Another (2012) eKLR* where the court held that to keep an employee on suspension for 8 months waiting for them to leave is unlawful and inhumane. In this case, the owing salary should be paid. The burden of proving that the same was paid rests on the employer since the employers keep employee records. In *Patrick Lumumba Maikura versus Kenya Ports Authority (2013) eKLR* the court held that the burden to disprove payment is on the employer who has a duty to do a contract and keep custody of records together with those of salaries. Where an employee claims that there was an unpaid salary, it is incorrect for an employer to state that this salary was paid without any proof. In this case, there were earned salaries which have not been disputed and has nothing to do with the other claims and in the interests of justice and absence of proof of such payment, the claimant should be paid these dues. These salaries arose while the claimant was in active employment with the respondent and before his suspension and before the respondent was placed under statutory management.
 11. In respondent, advocate for the respondent submitted that the application as filed is invalid as the affidavit in support of the application is undated and was before a Commissioner for Oaths on a date not disclosed and the court cannot rely on such a document. There is therefore an application that has no basis and thus incompetent.
 12. On the merits of the application, the respondent submitted that the claimant is seeking payment of salaries without the statutory deductions from the contract amount and indication that the application is not brought in good faith. The claim states that the salary due was at Kshs.400,000.00 per month but there were deduction of Kshs.278,000.00 and thus to claim more would be an illegality. The claimant had a deduction of Kshs.70,000.00, Kshs.80,000.00 car loan deductions and Kshs.107,932.00 as statutory deductions as well as NSSF and NHIF deductions. The failure by the claimant to disclose these amounts is to claim an equitable remedy without being equitable in the first instance. The duty rests on the claimant and not the court to make these calculations and the claimant must be candid.
 13. That the salaries being sought for September 2006, does not arise as the claimant was employed in June 2006 and there is no explanation why the third month of September 2006 soon after employment, the salary was not paid. The claim for September 2007 salary does not arise as this claim did not arise during the pendency of the claimant's employment and the cited cases in support of this claim are not relevant. In normal circumstances, an employer does keep employee records but the respondent faced peculiar circumstances as they were placed under receivership and before the Commissioner for Insurance could place a caretaker committee in charge, it was 4 days after the claimant was terminated. After the receivership, most documents could not be traced and to date, the respondent is still searching for these documents and therefore should not be punished for not keeping these records. From 18th December 2008, the respondent was at the hands of the government and any claims before this date cannot be against the respondent. In this case the claimant is making sure that his file is not traced.
 14. The salary claim for October 2007 is misconceived as the claimant in his own demand letter stated that the only salary due was for November. This was at a time when his mind was fresh. Upon the claimant realization that his file was misplaced, the claim for October was added. This is an issue that requires the claimant to be placed in evidence for cross-examination as this issue cannot be addressed through affidavits only.
 15. The salary claim for November 2007 was not raised in the claimant's letter of demand on 13th February 2008 an indication that these claims are not systematic and if this arose in 2008, then it is time barred. The claim for December 2008 must fail as the claimant admits he did not work from 14th December 2008. No services were rendered to the respondent to warrant a claim for a full month salary and thus must fail. The respondent further submitted that this application is made with ulterior motive to cascade the issues involved which can only be demonstrated in a full trial.

Determination of the issues

16. The issues relating to the respondent's preliminary objections dated 12th August 2013 have already been addressed. This will not be gone into in this ruling.
17. The other issue pending is whether the application is defective as the supporting affidavit is undated. In this regard I note The Oaths and Statutory Declaration Act at section 5 states;

Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly the jurant or attestation at what place and on what date the oath or affidavit is taken is mad

18. These are mandatory provisions. There is no discretion for this court to vary these provisions as these are statutory provisions with regard to what constitutes a valid disposition to matters before court. The omission to indicate the date of swearing of the affidavit attached to the application before court renders the same defective and should be struck out which leaves the current application unsupported with regard to averment of Auma Okoth. This was the holding in *Jayantkumar Vrajilal Shar versus Chandulal Mchanlal Shar and another, HCCC 1280 of 1997*. The defect on the affidavit is not a mere technicality that can be addressed as under Article 159 of the Constitution. The undated affidavit violates a statutory mandatory provision and thus the striking out. The claimant's advocate stated that the affidavit in his possession was dated, however the affidavit in the court file and the one served on the respondent's advocate is undated a fact that was noted by the respondent's advocate. The court record should be taken as it is and in this case, the official record indicate the supporting affidavit is undated as held in *Duncan Mwangovya versus Meena Bhangwandas Patel, HCCC 196 of 2005*.
19. I however note that before the defects outlined above were addressed the claimant had also filed his own affidavit separate from that of the advocate as a Further Affidavit. This affidavit is compliant to the Oaths and Statutory Declarations Act. It is not a supporting affidavit, rather is a further affidavit. This further affidavit will be considered on its own with regard to the facts stated therein. This is however a further affidavit and not an affidavit in support of the filed application and as outlined above the Further Affidavit as filed does not in any way address the defect rather it stands on its own. The application remains without a valid affidavit in support as per procedure.
20. Looking at the substance of the application, for a party to seek to separate part of a claim that is said to be uncontested from the other claims, care must be taken as to how undefended claims are addressed. Looking at the Industrial Court Act section 3 and Industrial Court Procedure Rules, parties with claims before the Industrial Court are encouraged to address them in an expeditious manner. This does not include taking part of the claim from the others to have piecemeal issues before court. If a party has an opportunity to address the uncontested claims, the appropriate thing to do is to have all pending issues addressed. That is what is expeditious and judicious.
21. In the history of the claim, parties initially filed this claim before this court was elevated to the status of a High Court; it went before an arbitrator, to the High Court and to the Industrial Court as a superior court. If there was no defence filed in the current claim until the one dated 16th March 2012 was filed, there is specific procedure with regard to undefended claims. The claimant was not prevented from making use of these procedures or the procedure as outlined under the Industrial Court Procedure Rules and other enabling provisions of the law. To address what is now called undefended claims in the manner the claimant has are an issue overtaken by events. Even in a case where there was a proper application with an attached affidavit in support, this court would still have been hesitant to grant the orders sought by the claimant. This is not an expeditious manner to address the issues before court. There is now a defence on record where the claims have been denied and further to ask the Court to make orders for claims that in themselves are inherently part of a claim for unfair labour practice, these are matters of evidence and require proof for the court to award.
22. Without going into the merits of the main claims as outlined by the respondent in their extensive submissions, the application is defective in a material way and substantially cannot be granted at

this stage. The prayers sought will not be granted in the interim. These require full hearing for the court to properly address all the issues in a holistic and conclusive manner.

The application dated 5th August 2013 is dismissed. Costs will be in the cause.

DATED and DELIVERED at NAIROBI this 5th Day of February 2014

M. Mbaru

JUDGE

In the presence of

.....

.....