



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 2041 OF 2013

BETWEEN

CATHERINE MWIHAKI NGAMBI..... CLAIMANT

VERSUS

MATHS TRADING COMPANY LIMITED..... RESPONDENT

RULING

1. On 19th December 2013, the Claimant approached the Court with an application seeking to restrain her Employer, the Respondent herein, from terminating her contract of employment. The Court [Hon. Lady Justice Maureen Onyango] ordered in the presence of Advocates for both Parties, on 27th December 2013, that the status quo be maintained, and Parties be heard *inter partes* before the Trial Court [Rika J], on 28th January 2014. The Respondent's Advocates confirmed to Lady Justice Onyango that no disciplinary proceedings had ensued against the Claimant as of 27th December 2013. Retention of status quo meant the Claimant would remain in the employ of the Respondent, at least until the hearing *inter partes*, on 28th January 2014.
2. On 20th January 2014, the Claimant was issued by the Respondent with a letter of termination of employment.
3. When the Advocates attended the Court for the hearing on 28th January 2014, the Court found the Respondent to have contravened the Order given on 27th December 2013. The Respondent was ordered to reinstate the Claimant to the position she held, as of 27th December 2013; she was to continue working in that position, until the application was heard *inter partes* and determined; the Advocates were to take another date for the hearing; and the Respondent was directed to provide the Court with written confirmation that the Claimant was back at work at the next hearing.
4. The Claimant subsequently filed an application dated 3rd March 2014, which in main, seeks leave to have the Respondent's Directors, cited for Contempt of Court. The application is supported by the affidavit of the Claimant sworn on 3rd March 2014, in which she states that the Respondent did not reinstate her, or provide the Court with written evidence of reinstatement, as Ordered by the Court. She was instead placed on compulsory leave and investigations against her commenced.
5. The Respondent filed a replying affidavit sworn on 10th March 2014 by its General Manager Abraham Chacko. He denies that the Respondent flouted the orders of the Court. The Respondent does not deny sending the Claimant on compulsory leave, but submits it has been paying her salary for all the months due, after the Order of reinstatement. Payment of the salary is evidence that the Respondent has reinstated

the Claimant.

6. The Parties' Advocates, Mr. Mukele for the Claimant and Mr. Ombajo for the Respondent, presented their arguments on leave to bring contempt proceedings against the Respondent's Directors, on 7th April 2014. Upon careful evaluation of the application, the affidavits sworn in support and in reply, and upon careful evaluation of the submissions made by the respective Advocates, the Court rules:-

- a. There is prima facie evidence to justify the grant of leave to bring contempt proceedings against the Directors of the Respondent;
- b. There has been a clear pattern of serial violation of the Orders issued at different times by the Court on the part of the Respondent;
- c. Firstly, the Court issued Orders for retention of status quo on 27th December 2013. The Respondent confirmed to the Court that the Claimant's contract of employment would not be terminated, and no disciplinary proceedings had ensued. Parties were scheduled to return to Court for hearing on 28th January 2014. In between, on 20th January 2014, the Respondent issued the Claimant a letter of termination of employment. This was the first violation.
- d. Secondly, the Court ordered the Respondent to reinstate the Claimant to the position she held before the letter of termination. She was to continue working, until the main application was heard and determined. The Respondent was ordered to supply the Court with written evidence of reinstatement, at the next hearing.
- e. The Respondent alleges it continued to pay the Claimant's salary, and this was evidence of reinstatement, and therefore full compliance. The Court finds there was no reinstatement, and no compliance. The Claimant did not continue working, and no written evidence of her reinstatement was availed to the Court as directed. The Claimant was sent on compulsory leave. This was the second violation.
- f. Reinstatement as understood by this Court does not mean mere payroll reinstatement. There is evidence the Claimant continued to receive her salary after the Order of reinstatement. This was only partial compliance by the Respondent, with the Order of reinstatement. Reinstatement carries with it the requirement that the Employer provides the Employee with actual work. This means the Employee is placed back to the position he/ she held before termination, which means the Employer must recommence paying or providing benefits attached to the position and secondly, place the Employee back in performance of the duties he/ she was performing before termination.
- g. The Respondent partially complied with the Order for reinstatement by granting the Claimant payroll reinstatement, but did not provide her with actual work, choosing instead, to send her on compulsory leave. It is true as submitted by the Respondent, that the Respondent is losing money, by continued payment of salaries to an Employee who is not performing active duty. This however is a situation created by the Respondent, who contrary to the Orders of the Court, opted to comply partially. Orders of the Court must be fully obeyed, not obeyed in shades, or selectively. Our law does not contemplate the dilution of the Order of reinstatement, and gives no option for Employers to grant payroll reinstatement, without restoration of actual duties to the Employee.
- h. This Court has time and again ruled in past disputes between Employers and Employees that the Court should be slow in interfering with disciplinary processes at work. When interim orders issue restraining an Employer from proceeding with an employment termination process, it is important that both Parties submit themselves in full to Judicial Authority. No one doubts the credentials of the Respondent as an investor, or that the Respondent is doing business in Kenya in good faith for the good of the country. The Court is not even questioning whether the Respondent has valid reasons to want to disengage the Claimant. The concern of the Court is that an Employee came to Court under certificate of urgency, alleging her contract was about to be unfairly terminated; the Court granted her a very short term provisional measure, requiring she retains her position, until

the application was heard and determined. The concern of the Court is that the Respondent seems to have disregarded the provisional measure, and is bent on subverting fair administration of justice. The trend the Respondent has adopted can only lead to a situation where there is no law and order in the corridors of industrial justice, where Employers and Employees resort to self-help, and industrial peace is compromised. The concern of the Court lastly, is that the drift the Respondent has taken, would, if not checked result in defiance of the Court's authority; cast disrespect on the Court; and impede the ability of the Court to perform its Legal and Constitutional function.

- i. The Claimant has demonstrated to the Court that leave, to bring contempt proceedings against the Directors of the Respondent Company, is warranted. Regrettably when such proceedings are instigated, they tend to delay, or cloud the real issues in dispute. It may take time for the Parties to have any form of disciplinary proceedings at the workplace, and it definitely will take time before the application which ought to have been heard on 28th January 2014, is heard. The substantive dispute shall remain in abeyance for unnecessarily long period. The substantive rights and obligations of the Employer and the Employee shall remain unknown as these interlocutory applications are heard and determined. These are some of the issues Parties ought to consider before they engage in these distractions. Contempt of Court does impede the ability of the Court to discharge its mandate. IT IS ORDERED:-

[a] The application by the Claimant dated 3rd March 2014 is allowed in terms of prayer [1].

[b] Costs of the application to the Claimant.

Dated and delivered at Nairobi this 27th day of June 2014

James Rika

Judge