



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 794 OF 2013

(Before D.K.N. Marete)

ENGINEER MWALIMU KITHOME MUSAU.....CLAIMANT

Versus

KENYA WATER INSTITUTE.....1ST RESPONDENT

GEORGE OCHILO MBOGO AYACKO.....2NDRESPONDENT

RULING

This is an application dated 28th February, 2014 on the part of the Claimant/Applicant and is brought to court by way of a certificate of urgency. It seeks the following orders of court;

1. ***THAT*** this Honourable Court be pleased to certify this Application urgent and the same be heard ex-parte in the first instance.
2. ***THAT*** this Honourable Court be pleased to order the 1stRespondent herein to provide the Claimant with the instrument of termination of the claimant's employment with the 1st Respondent, if any, within such time as this Honourable Court may direct.
3. ***THAT*** in default of the 1stRespondent availing the instrument of termination of the Claimant's employment as sought in prayer 2 above within the period prescribed by this Honourable Court, this Honourable Court be pleased to order the 1stRespondent to pay and continue paying the Claimant such half salary due and payable to him based on the interdiction letter dated 8th April, 2013 (including such backdated payments due), pending the hearing and determination of the main suit.
4. ***THAT*** costs of this Application be in the cause. and is supported by the Supporting Affidavit of Engineer Mwalimu Kithome Musau sworn on 28th February, 2014. This application is premised on the following grounds;
 - A. The Claimant filed the suit herein on 24th May 2013 together with an Application dated 24th May 2013 seeking interim injunctive orders against the purported termination of the Claimant's services and on 30th May 2013, this Honourable Court granted temporary orders of injunction against the purported termination of the Claimant's services pending the hearing and determination of the Application.

- B. *While the Application dated 24th May 2013 was still pending before this Honorable Court, the 1st Respondent paid the half salary payable to the Claimant while on interdiction for the months of May and June 2013.*
- C. *After delivery of this Honourable Court's Ruling on 17th July, 2013 the 1st Respondent failed to remit the Claimant's salary for the month of July 2013 and to date the Claimant has not been paid any half salaries for May and June 2013.*
- D. *The 1st Respondent alleges to have terminated the Claimant's services on or about 13th May 2013 and yet paid the half salaries for May and June 2013.*
- E. *Despite the alleged termination, the Claimant has not received any formal communication regarding the alleged termination of his employment with the 1st Respondent.*
- F. *The Claimant has sought the relevant instrument from the 1st Respondent on several occasions regarding his purported termination but to date the said instrument sought has not been provided.*
- G. *The Claimant has a right to access information held by the 1st Respondent which is a state agency pursuant to the provisions of Article 35 of the Constitution.*
- H. *As a State agency, the 1st Respondent is bound by the provisions of Article 35 of the Constitution.*
- I. *The 1st Respondent's failure to prove the Claimant with the information sought has breached the Claimant's right to fair administrative action under Article 47 of the Constitution.*
- J. *Without the information sought being provided to the Claimant, the Claimant has no way of knowing on what terms his employment with the 1st Respondent were terminated which would enable the Claimant to amend his Statement of Claim accordingly.*
- K. *The actions of the 1st Respondent are oppressive and have caused the Claimant severe hardship as the Claimant has no other means of sustenance while these proceedings are pending.*
- L. *This Honourable Court has jurisdiction to grant the orders sought herein.*

The respondents vide a Replying Affidavit sworn on 5th March, 2014 oppose the application and therein pray that the same be dismissed with costs.

The Claimant/Applicant's case is that during the pendency of this suit and while court orders prohibiting termination of his employment were in force, the 1st Respondent paid his half salary payable while on interdiction for the months of May and June, 2013. He is entitled to half salary, full house allowance and medical cover during such interdiction.

The applicant further avers that since July, 2013 to date, he has not received his half salary and has no other source of livelihood. He further avers that the 1st Respondent has continuously claimed that his services were terminated but has not been furnished with the instrument (read letter of termination) despite enormous pleas for the same. That he has made numerous pleadings for its issue to the respondent's advocates but to no avail.

The applicant contends and submits that this inaction on the part of the

1st Respondent is a violation of Article 35 of the Constitution of Kenya, 2010 on access to information by the 1st Respondent who is bound by the same. He further argues that this is also an infringement of his rights under Article 47 of the said constitution on fair administrative action.

The claimant/applicant closes by submitting that the actions of the 1st respondent are oppressive and have caused him severe hardship and therefore the prayer for orders sought in this application.

The 1st respondent in her replying affidavit and opposition to the application avers that the instruments of termination can only be properly and adequately addressed through interlocutrices and inspection of documents at trial as provided for under the Civil Procedure Act and Rules. She further avers that the orders sought cannot be granted on grounds that the services of the claimant were terminated on 13th May, 2012 and decision informed to him and therefore the institution of this suit.

The respondents aver that the claimant/applicant received his half salary upto July, 2013 pending the ruling of this court which was made on 17th July, 2013 and injunctive orders vacated. This was the common understanding of the parties to this suit.

The respondents aver that the prayers sought in this application are material to be canvassed in the main suit which the applicant is no longer interest in prosecuting and that the claimant vide this applicant intends to have this mater concluded by applications and not the main suit. That a granting of the alternative prayer will place the claimant in a comfort zone whereby he will not be interested in pursuing the main suit. He also avers that this application is an abuse of the process of court as the main suit is still pending and the grant of the prayers sought would pre-empt the main suit.

This application came for hearing severally until the 2nd April, 2014 when the parties made their respective submissions. Article 35 on Access to information as sought to be relied on by the claimants/applicants provides as follows:

1. *Every citizen has the right of access to-*
 - a. *information held by the State; and*
 - b. *information held by another person and required for the exercise or protection of any right or fundamental freedom.*
2. *Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*
3. *The State shall publish and publicise any important information affecting the nation.*

By their letter dated 19th September 2013 the claimants/applicants addressed counsel for the 2nd respondent enquiring on the position of termination and also requesting that they be furnished with instrument of termination of employment. The claimants/applicant has also annexed a barrage of correspondence *inter partes* raising issues on the instrument of termination and a production and issue of the same. The argument is that without a clear statement and information on this cardinal matter relating to status of his employment, he would be at loss at to the direction to pursue in this litigation.

Article 35 of the Constitution of Kenya, 2010 stands distinctly on the subject. There are no provisions for enactment of supportive legislation by parliament to further and facilitate its implementation. Parliament has not on its own motion found it fit to move in this direction.

Looking at these two opposing position on this application, it is clear that the claimant/applicant has a case against the respondents. This is because his half salary and perhaps other employment benefits have been denied on grounds of termination on employment. After the court ruling in july last year. This information is not clear or available to the claimant/applicant and therefore this application. It is not in dispute that parties and people generally are entitled to access to information held by the state or other persons that may be necessary for exercise or protection of any right or fundamental freedom. This is a constitutional right under the Bill of Rights and is not negotiable, or at all.

This court cannot sit and watch the Kenyan citizenry continue to suffer abuse and denial of their rights as enshrined in the Constitution. Our judiciary is one of the critical cogs in the implementation and realization of people's rights and fundamental freedoms. I therefore rise to the occasion and recognize

the claimant/applicant's rights on access to information and award the same.

I am therefore inclined to allow this application and order as follows:

1. That the 1st Respondent be and is hereby ordered to furnish the claimant/applicant with instruments of termination of his employment within 30 days of this orders of court.
2. That the instruments of termination for our purposes shall be construed to mean, letter of termination.
3. That the costs of this application shall be borne by the 1st Respondent.

Delivered, Dated and Signed in open court this 25th day of July 2014

D.K. Njagi Marete

Judge

Appearances

1. Mr. Kilonzo instructed by Sisule Munyi & Associates for the claimant/applicant.
2. Mr. Motende instructed by the State Law office for the 1st Respondent
3. Mr. Odhiambo instructed by Odhiambo & Co. Advocates for the 2nd Respondent