



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 327 OF 2014

JOSEPH GIDRAF WANJALA

CLAIMANT

v

DIANE HAMRICK

1st RESPONDENT

UNITED METHODIST MISSION

SCHOOLS (NAKURU)

2nd RESPONDENT

RULING

1. Joseph Gidraf Wanjala (Claimant) filed a Memorandum of Claim against Diane Hamrick and United Methodist Mission Schools (Nakuru) (Respondents) on 24 July 2014 and the issues in dispute were stated as unfair termination and reinstatement.
2. Together with the Memorandum of Claim was a Motion seeking one substantive order

THAT this Honourable Court be pleased to order reinstatement and access to the office of the principal of the claimant herein as the principal, member and secretary to the Board of United Methodist Mission School as the school is presently running without a principal.

3. The motion was placed *ex parte* before Ongaya J on 25 July 2014 and the Judge ordered that

THAT the chairperson of the 2nd Respondent to convene a meeting of the 2nd Respondent board members with a view of resolving the dispute and to file the board's resolutions by 30 July 2014.

4. This order should be understood within the context that the Constitution and the Industrial Court Act all encourage alternative dispute resolution.
5. The Court further directed that the motion be heard *inter partes* on 30 July 2014.
6. When the motion came up for *inter partes* hearing on 30 July 2014, Ongaya J ordered that

Pending further orders by the Court, the claimant will continue to serve as the principal and manager of the 2nd Respondent schools and further continue to serve as the secretary to the 2nd Respondent's board of management.

7. He further directed that the matter be mentioned on 6 October 2014 and encouraged the parties to settle the dispute. On 15 August 2014, the Respondents filed a Reply to the Memorandum of Claim.
8. On 18 August 2014, the 1st Respondent filed a chamber summons and motion seeking
 2. *THAT this Honourable Court be pleased to stay execution of the Orders issued on the 30th July 2014 pending the hearing of this application inter parte.*
 3. *THAT this Honourable court be pleased to review and or vary the Orders issued on the 30th July 2014.*
9. This motion of 18 August 2014 is the subject of this ruling.

1st Respondent's submissions

10. The 1st Respondent's case is that the motion dated 24 July 2014 and from which orders were issued on 25 July 2014 was not served upon the 1st Respondent or her Advocate on record.
11. The supporting affidavit of Mr. Steve Kabita also deposed that only the orders issued on 25 July 2014 were served upon the 1st Respondent but not the motion.
12. Mr. Kabita for the 1st Respondent submitted that the right of the 1st Respondent to be heard was taken away and that there was no proof that the motion was served upon the 1st Respondent.
13. He further submitted that the 2nd Respondent's constitution provided for conciliation and the Claimant did not attempt to follow this path.

2nd Respondent's submissions

14. Mr. Waiganjo for the 2nd Respondent opposed the application and stated that the 2nd Respondent entered appearance on 28 July 2014 and submitted that the motion had no merit as the Claimant's motion had not been disposed of.
15. He further submitted that the Claimant's motion dated 24 July 2014 was given an *inter partes* hearing date of 30 July 2014 and on that date, Mr. Ngamate held brief for Mr. Kabita for the 1st Respondent, Mr. Gatonye held his brief for the 2nd Respondent while Mr. Muthanwa was present for the Claimant.
16. He further submitted that during the appearance on 30 July 2014, Mr. Ngamate on behalf of the 1st Respondent sought for time to file a Response but instead of filing the Response he filed the instant motion.
17. Mr. Waiganjo also stated from the bar that 1st Respondent was using the Police to harass or intimidate the Claimant and a Pastor Wanjau Nyambura.

Claimant's response

18. Mr. Muthanwa urged the Claimant's response. He submitted that the application filed on 18 August 2014 was *res judicata* as the issues were ventilated and orders issued on 30 July 2014 and that the application amounted to an appeal.
19. He also urged that the application lacked merit because the orders were issued in the presence of an advocate holding brief for Mr. Kabita.
20. He further submitted that the 1st Respondent had not followed the right procedures for review.
21. He also stated from the bar that the Claimant was being harassed by the Police.

Evaluation

22. The substantive question begging for an answer is whether the Claimant's motion filed in Court on 24 July 2014 was served upon the 1st Respondent.

23. Ongaya J had ordered that the motion be served for *inter partes* hearing on 30 July 2014.
24. The primary reference point to confirm whether pleadings or other court process has been served is the filing of an affidavit of service. I have perused the Court record and there is no affidavit of service on record to suggest that the 1st Respondent was served.
25. Failing the primary reference point, the Court, to do substantial justice can look at the surrounding circumstances to confirm whether service was effected.
26. The Court record bears out that the firm of Kiarie, Kabita Kihunyu & Co. Advocates filed a Memorandum of Appearance on behalf of both the Respondents on 30 July 2014. This was on the morning when the Claimant's motion was coming up for *inter partes* hearing.
27. Although the rules of this Court do not provide for filing of a Memorandum of Appearance, the fact that the firm of Kiarie, Kabita Kihunyu & Co. Advocates filed a Memorandum of Appearance gives a strong suggestion that both Respondents had been served.
28. The minutes of the proceedings taken on 30 July 2014 also indicate that Mr. Ngamate was present and held brief for Mr. Kabita for the 1st Respondent.
29. Further, the 1st Respondent did not suggest that entering appearance for both Respondents was in error.
30. The Court also wishes to discuss very briefly the deposition in the supporting affidavit of Steve Kabita. Paragraph 4 of the affidavit deposed

4. THAT the 1st Respondent was only served with an Order issued on the 25th July 2014 in the above cause but not with the Notice of Motion dated 24th July 2014.

31. Now it is trite that where what is deposed to in an affidavit is based on information, the source of the information should be disclosed. Pleadings and other court process are ordinarily served at the first instance upon the respective parties. In the instant case, Mr. Kabita as an Advocate has sworn an affidavit on non service. I would have expected the 1st Respondent to depose as to what she was served with and not her Advocate, who presumably was instructed after service was effected.
32. Although the 1st Respondent deposed a 6 page lengthy affidavit on 18 August 2014 before Momanyi Gichuki, Commissioner for Oaths, she did not address the issue of service at all.
33. On a preponderance of the evidence and minutes of the proceedings, the Court is satisfied that the 1st Respondent had been served and was represented by counsel adequately briefed to participate in the proceedings.
34. Because of the conclusion reached, it is not necessary for the Court to discuss the issue of *res judicata* raised by Mr. Muthanwa.
35. Before concluding, the Court wishes to observe that specific performance should be ordered in very exceptional circumstances in the employment relationship. Reinstatement should also be granted only as a final remedy after hearing a Cause on the merits. Employment is all about trust and confidence between employer and employee.
36. In the instant case, the Court appears to have ultimately ordered reinstatement at the interlocutory stage.
37. In order to do substantial justice to all the parties, the Court is of the view that this Cause should be set down for hearing on a priority basis on a date convenient to the parties and the Court.

Conclusion and Orders

38. The upshot of the foregoing is that the motion dated 18 August 2014 lacks merit and dismissed with no order as to costs.

Delivered, dated and signed in open Court in Nakuru on this 14th day of November 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For 1st Respondent Mr. Kabita instructed by Kiarie Kabita Kihunyu & Associates Advocates

For 2nd Respondent Mr. Waiganjo instructed by Waiganjo & Co. Advocates