



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1580 of 2012**

LEMPAA VINCENT

SUIYANKA.....CLAIMANT/APPLICANT

-VS-

KENYA BROADCASTING CORPORATION.....1ST  
RESPONDENT

WAIHENYA WAITHAKA.....2ND  
RESPONDENT

VITALIS MUSEBE.....3RD  
RESPONDENT

CHRISTINE NJAGI.....4TH RESPONDENT

**RULING**

On 6th September 2012 the Claimant /Applicant filed a notice of motion under certificate of urgency, seeking the following orders:

1. **THAT** this application herein be certified urgent and be heard ex-parte in the first instance during the current vacation.
2. **THAT** a date be appointed for the hearing of the application inter partes on priority basis.
3. **THAT** an Order be issued compelling the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent to produce a letter written to them by the Permanent Secretary, Ministry of Information and Communication directing them to stop paying any employee in accordance with the Code of Regulation and in discrimination against the Claimant and the other employees in the Corporation and recover the money from those whose salaries and allowances had been adjudged in accordance with the Code of Regulation.
4. **THAT** an Order be issued compelling the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent to produce to the Claimant, the minutes of the meeting held at the Kenya Broadcasting Corporation on the 22<sup>nd</sup> February, 2012, where the Permanent Secretary, Ministry of Information and Communication ordered the Respondents to stop discriminating the Claimant and ordered them to pay him in accordance with the new grades reflected in the Code of Regulation (COR) after he was promoted in November, 2010.
5. **THAT** an Order be issued compelling the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent to produce the minutes of a meeting held in the Corporation on 5<sup>th</sup> March, 2012, between the Claimant and other employees' representatives, the Minister for information and communication, Permanent Secretary, Ministry

of Information and Communication and officers from the Ministry of Labour where a comprehensive return to work formula was agreed on after the Petitioner and other employees of the Corporation went on strike on the 29<sup>th</sup> day of February 2012.

6. **THAT** costs be in the cause.

The application is supported by the affidavit of the Claimant who appears in person.

The 1st and 2nd Respondents filed a replying affidavit through **VITALIS MUSEBE** who is the Managing Director of the 2nd Respondent **KENYA BROADCASTING CORPORATION** and on his own behalf through **KANGETHE & MOLA ADVOCATES**. In the Replying affidavit he raises the following issues

- (i) that he has not been personally served,
- (ii) That no substantive orders are sought against him in the application and that he has been wrongfully enjoined in the application,
- (iii) That the allegations against him are in bad faith.

He asks the court to dismiss the case against him.

The 1st Respondent also filed a replying affidavit sworn by the same **VITALIS MUSEBE** who is the Managing Director of the 1st Respondent. In a long replying affidavit of 62 paragraphs the 1st Respondent raises the following issues among others-

- (i) That the Claimant is seeking release of a letter which is not authored by the Respondents and whose contents he is aware of,
- (ii) That the Claimant is seeking production of minutes whose contents he is aware of and should produce his own copy,
- (iii) That this court has no jurisdiction to try this claim as it is a constitutional matter which ought to be made in a constitutional court that the application is bad in law and an abuse of the court process, that the claimant has not filed a substantive claim and the jurisdiction of this court cannot be exercised in a vacuum,
- (iv) That the claimant has not exhausted the machinery available to him for resolution of his case as provided for in the 1st Respondents Code of Regulations before coming to court

The application was heard *ex parte* in the first instance on 7th September 2012 when the court ruled that there was no urgency in the application and directed the Claimant to serve the application on the respondents. The application was fixed for hearing on 24th September 2012 when the Respondent was not ready to proceed as they had not filed replying affidavits. The application was heard on 11th October 2012. The Claimant appeared in person while the 1st and 2nd Respondents were represented by KHISA who made lengthy submissions and referred to several authorities.

The court has framed the issues for determination as the following-

- (a) Whether the case is properly before the court
- (b) Whether this court has jurisdiction to hear this matter
- (c) Whether the claimant is entitled to the orders sought.

It is a cardinal principle of law that where the issue of jurisdiction has been raised in a matter the court must deal with it first and only deal with the other matters where it finds that it is clothed with

jurisdiction.

The Respondent has raised the issue that this court has no jurisdiction to hear this case as it raises constitutional issues. This matter was recently the subject of **NAIROBI HIGH COURT PETITION NO. 170 OF 2012**. In that case Majanja J held that this court has jurisdiction to hear all constitutional matters relating to employment. He considered the provisions of Articles 23, 162 and 165 of the Constitution and held as follows

***“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act 2011 or to interpret the constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court.”***

Article 165(5) Section 12 of the Industrial Court Act in fact expressly deny the High Court jurisdiction to handle matters within the jurisdiction of the courts contemplated in Article 162, that is the Industrial Court and the Land and Environment Court.

This court therefore has exclusive jurisdiction to determine the matters raised in this application as they relate to the employment relationship between the Claimant and the 1st Respondent.

The second issue for determination is whether this application is properly before this court. Rule 4 of the Industrial Court (Procedure) Rules 2010 provides that-

***“A party who wishes to refer a dispute to the court under any written law shall file a statement of claim setting out-...”***

The words used are mandatory. In this case the claimant has instituted the claim by a notice of motion. A claim even under the Civil Procedure Act can only be instituted by a plaint, an originating summons, a petition or a miscellaneous application. A notice of motion can only be brought within an existing case. The application is not anchored on a case and cannot exist on its own. The Applicant has stated in the certificate of urgency that he is yet to file the claim. The claim therefore does not exist. Giving such an order would be speculative and the court cannot issue speculative orders. If the claimant wishes to make the application he must first file a valid claim and then the court will be able to determine if he really merits the orders sought in his application. He does not need the orders to file a claim as he is seized of the facts necessary to file the claim as he has deponed that he is privy to those facts having been present at the meetings where the issues were discussed. For these reasons the application is struck out for being improperly before the court.

Having struck out the application, the court does not have to deal with issue number 3 s framed by the court.

Each party shall bear its costs.

Orders accordingly.

**DATED AND DELIVERED IN NAIROBI THIS 15<sup>TH</sup> DAY OF NOVEMBER 2012.**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE.**

\_\_\_\_\_ **for Claimant**

\_\_\_\_\_ **for Respondent**