Mutali v Busia Water and Sanitation Company Limited (Employment and Labour Relations Cause 5 of 2020) [2023] KEELRC 2249 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2249 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

EMPLOYMENT AND LABOUR RELATIONS CAUSE 5 OF 2020

JW KELI, J

SEPTEMBER 29, 2023

BETWEEN

BERTHA NALIAKA MUTALI ..... CLAIMANT

AND

BUSIA WATER AND SANITATION COMPANY LIMITED ..... RESPONDENT

RULING

1. The claimant post judgment delivered on the November 3, 2022 in open court in the suit before this court brought the instant application by way of Notice Motion dated June 20, 2023 and received in court on the June 26, 2023 seeking that the court grants leave of court not to be reported on Kenya Law Online platform for cause 5 of 2020.

2. The applicant in support of the application filed verifying affidavit sworn on June 20, 2023.

3. The following grounds were raised in support of the application both in the Notice of Motion and the supporting affidavit:-

    a. That thus matter Mutali v Busia Water & Sanitation Company Limited (cause 5 of 2020) judgment was delivered in open court at Bungoma on November 3, 2022.

    b. That it came to notice of the applicant in the month of June 2023 that this matter is in public domain on Kenya Law website as, ' Mutali v Busia Water & Sanitation Company Limited(Cause 5 of 2020) KEERLC 13178(KLR)(3 November 2022)(Judgment)

    c. That her name being put out in such a manner not only prejudices her as a job seeker to hiring managers but also brings anguish to her family.

    d. That as a job seeker any further delay on pulling down the page prejudices and jeopardizes her chances of getting meaningful means of livelihood to prospective employers and hiring managers and further she continued to suffer loss and damage.

4. The application was not opposed. The claimant argued her case orally before the court. The respondent through counsel Gakuya James informed the court that they were not opposed to the application.

Determination

5. The issue for determination was whether the application merits issuance of court order for the judgement in the suit published by the National Council for Law Reporting("Kenya Law") to be pulled down.

6. The statutory mandate of monitoring and reporting the development of jurisprudence is bestowed on Kenya Law under the *National Council for law Reporting Act*, No. 7 of 2007("the Act"), which is achieved through publication of Kenya Law Reports and updating the Laws of Kenya.

7. Section 19 of the said Act provides that "Every judge of the superior court of record shall as soon as practicable after delivering a judgment, ruling or an opinion cause to be furnished to the Editor a certified true copy of the judgment, ruling or opinion delivered by him." The court holds that this legal requirement is mandatory in nature. Once decisions are sent by judges, by dint of section 21 of the Act, the law reports so printed by Kenya law are deemed as the official law reports of the Republic of Kenya which may be cited in proceedings in all the courts of Kenya and beyond the borders.

8. The claimant brought its application under article 50 (1) of *the Constitution* which guarantees every person the right to a fair hearing and to have any dispute that could be resolved by application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The court holds that the suit was heard in accordance with article 50 in open court and a judgement delivered thereof and that the claimant did not raise issue with the proceedings.

9. The claimant argues that the published judgement will bring anguish to her family and prevent her from prospective job opportunities from employers and hiring managers. How so, the claimant has not told this court the nature of anguish and how the judgement as published will prevent her from prospective opportunities. The claimant has not shown how, the publication of the judgment continues to cause her loss and damages. In any case issue of loss and damages cannot be raised in an application in decided case.

10. The applicant seeks to question the reporting / publication of decisions of the court which is necessary to support the thriving common law doctrine of stare decisis/precedent adopted by the Judiciary of Kenya for ages. The *Black's Law Dictionary* (10th ed. 2014) defines stare decisis as the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation); The term precedent is defined as a decided case that furnishes a basis for determining later cases involving similar facts or issues. Law reporting of decisions by Kenya Law enables the availability of the decided cases/precedent by higher courts such as this court to litigants and lower courts as a basis of determining later cases involving similar issues or facts. This doctrine of precedent as properly applied greatly aids in the administration of justice in the following ways:

    a. 'It ensures certainty in the law. People are able to order their affairs and come to settlements with a certain amount of confidence when the outcome of litigation can be predicted by referring to previous decisions of the courts.

    b. It ensures the impartiality and transparency of judges. Generally, a judge is bound to follow the law enunciated in a previous case unless he or she can overrule or distinguish it.

c. It offers opportunities for the development of the law and the evolution of jurisprudence which cannot be provided by Parliament. The courts can more quickly lay down new principles, or extend old principles, to meet novel circumstances."[1]

11. The judgment of the court was on an employment claim on various grounds. The claim was dismissed. The court at time of determination of the suit did not consider that the facts disclosed any vulnerability to the claimant outside normal employment issues to warrant obscuring the name of the claimant by use of initials. Examples of such vulnerability in an employment claim would be like claims of sexual exploitation or harassment. This was not the case here. Relying on the decision in *Tumaz and Tumaz Enterprises Limited & 2 others v National Council for Law Reporting* (Miscellaneous Civil Case E144 of 2021) [2022] KEHC 14747 (KLR) (1 November 2022) (Judgment)) the court observed that:-

> " 108. Generally speaking, the Government cannot be liable for privacy intrusion by communicating public information, if no malice on the part of the government is pleaded and proved. For example, the government or public entity will not be liable for releasing information regarding a person's criminal conviction to the public if the applicant:i.had discussed about the conviction in a letter to a newspaper;ii.criminal conviction record is public information;iii.was under probation supervision;iv.puts forth no evidence about confidential information release to the public.
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> 109. I have considered the decision which was reported by the respondent via avis my analysis above. The main suit between the parties thereto is still pending before court. The application which gave rise to the published ruling was interlocutory in nature. It was heard in public and a ruling publicly pronounced. The applicants never sought for a private or in 'camera' hearing or delivery of the ruling by the learned Judge in private.
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> 110. The applicants also never sought for any anonymity of the parties or parts of the ruling. They never asked the court to consider the matter private although the dispute is between private persons/natural and corporate. No minors are involved in the dispute. It is not a matter involving sexual offences or family disputes. It is a commercial dispute between and among entities. (Emphasis added.)

12. The court rendered its decision as stated by the claimant on the November 3, 2022. The claim was filed on June 26, 2023. The court shared the decision with Kenya law within 7 days of the judgment delivery. As at time of filing the instant application the judgment had been online over 6 months. The court is not responsible for what happens to its judgment after delivery. Kenya law is a statutory body with mandate to publish decisions of the court. The court lacks control over its delivered decisions and how they are published. The claimant never sought at any time of the proceedings for the court to protect her identity. I am persuaded by the decision in *Tumaz and Tumaz Enterprises Limited & 2 others* (*supra*) and do hold the case lacks merit as the claimant never sought for protection of identity at the hearing stage in a matter heard in open court. The prayer for protection of identity ought to have been made at the hearing and is thus overtaken by events as the judgment was delivered and published over 6 months ago.

13. The court further looked at this novel request with lense of public interest and precedent creation. The claimant seeks to have her name 'Mutali" removed on basis it prejudices her position as job seeker.

[1] Kenya law website under subtitle at home page 'About us"

The claimant has not disclosed any special circumstances which distinguishes her from other reported decisions on employment claims. It would not be in public interest to deny potential employers information about prospective employees which is held by the state. The claimant has a right to correct any untrue fact which may be in the said decision by way of appeal to higher court or explain herself before the prospective employer.

14. In the upshot for the foregoing reasons the court holds that the application was overtaken by events the judgment having been long published, that the reliefs sought are against public interest of creating precedent and right to information held by the state. The application is dismissed for lack of merit with no order as to costs.

15. Right to appeal in 30 days.

16. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF SEPTEMBER 2023.

JEMIMAH KELI

JUDGE