REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 9 OF 2019

IN THE MATTER OF ARTICLES 40, 47, 50(1), 50(2), 48, 64 AND 67 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ORDER 53 RULES 1 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26

AND IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONN ACT NOT 4 OF 2015

IN THE MATTER OF UNIVERSITY OF NAIROBI ACT, NO 4 OF 2012

REPUBLIC.....APPLICANT

VERSUS

UNIVERSITY OF NAIROBI.....1st RESPONDENT

VICE CHANCELOR.....2nd RESPONDENT

DEPUTY VICE CHANCELOR

(STUDENT AFFAIRS).....3RD RESPONDENT

EX PARTE:

1. MWANGI EMMA WAHITO

2. OKUMU JUSTICE ONYANGO ALIAS JOKU

RULING

The Application

1. Emma Wahito and Okumu Justice Onyango alia Joku are the *ex parte* Applicants in this application, and are hereinafter referred to as "the Applicants". The two Applicants are law students at the University of Nairobi, which is the 1st Respondent herein. They contend that the Deputy Vice Chancellor (Student Affairs) of the 1st Respondent, and who is the 3rd Respondent in a letter dated 20th December 2018 and delivered to them on the 14th January 2019, suspended them from the said University with immediate effect. The letter indicated that they would be advised as to when they would be called upon for the disciplinary hearing.

2. They subsequently moved this Court and were granted leave to institute Judicial Review proceedings against the Respondents and that the said leave to operate as a stay of the Respondents decision. It is their case that they served the orders on the Respondent who disregarded them and that is why they have moved the court through their Notice of Motion application dated 29th January 2019 as amended on 4th February 2019 in which they seek the following orders:

a) That the 1st Respondent's Senior Legal Officer, one Mr. Collins Omondi, be cited for being in contempt of the court's order made by this Court on 24th January 2019, and be jailed for six months and or fined such sum of money as this Court may deem just to purge the contempt.

b) That an Order directed specifically to the Deputy Vice Chancellor (Student Affairs), the Chief Security Officer, Main Campus and Chief Officer/Head of Security at Parklands Campus, all of the University of Nairobi, allowing the Applicants herein into the university premises/precincts unconditionally and with immediate effect be issued by this Honourable Court.

c) That the Officer Commanding Police Station (OCS)-Parklands Police Station to enforce the orders issued herein.

d) That the costs of this application be borne by the Respondents.

3. The application was supported by the grounds on its face and the supporting affidavits of the Applicants sworn on the 4th February 2019. The 1st Applicant contends that besides service of the order on the Respondents by his advocate he was still denied entry by the security officers, on the 28th when he went to the campus to sit for the examinations, he was forcefully removed from class by the head of security Mr Mauti and another security officer. He thereafter went to main campus to see the director of Security Mr Wahome who contended that he could not issue instructions to security officers at parklands campus as he had not received information from the legal office.

4. The 2nd Applicant also contended when the court issued the orders on the 24th January 2019 , they served them on the Respondents' Advocates. In addition, that on the afternoon of the day of issuance of the order, he got a handwritten order from the registry, and rushed to campus as he had a continuous assessment test in the afternoon and showed the order to the security personnel at Parklands Campus, but that they denied him entry on the grounds that they had not received communication from the relevant officials of the University, being the Chief Security Officer. Further, that the next day his advocate communicated that the order had been served on the Respondents' Advocate, but when he arrived on campus he was still denied entry on account of the same reasons, even after showing them the order.

5. It is the Applicants' case that the officers are using the bureaucracy, chicanery and arrogance for the disobedience of court orders and that it is important that the court orders are executed and enforced, as their rights to education, freedom of association and expression are at risk of violation.

The Response

6. The 1st ,2nd and 3rd Respondents filed grounds of opposition dated 6th February 2019 against the application for contempt on the following grounds:

a) That the application is fatally incompetent and incurably defective.

b) That the application herein is premature, misconceived and bad in law as that the Respondents had not been served with the orders personally.

c) That the application herein is premature, misconceived and bad in law as the order did not come together with an endorsed penal notice warning of the consequences of disobedience.

d) That the application lacks merit as it is addressed against an office and not an individual as provided for in the law.

e) That the Court Order was issued against the Vice Chancellor and Deputy Vice Chancellor did not specify the attendant University with detail. Therefore the claim by the applicant against the Respondents for contempt of Court is null and void. The applicant cannot found a cause of action by instituting a wrong party.

f) That this application is frivolous, vexatious and lacks merit and ought to be dismissed.

g) That the application is an abuse of precious judicial time and it is in the interests of justice and fairness that the instant applications be dismissed with costs to the Respondents.

7. The alleged contemnor, Frederick Collins Omondi, also filed a replying affidavit sworn on 8th March 2019 opposing the application. He contends that he works as independent in-house counsel at the University of Nairobi, and that he has no direct or remote interest in the case before the courts and denied the contents of the application. He contended that he is not the Respondents' accounting officer and does not understand why the Applicants have instituted the proceedings against him on matters which he has no jurisdiction over.

8. Further, that matters touching on the conduct of examinations, security and suspension of the Applicants from the said university are not within his jurisdiction of work, and he lacks capacity and authority to comment on or respond to. He averred that the application as drawn is a threat and infringement to his inherent and fundamental rights and freedom in the Bill of Rights, and shall infringe on his rights to liberty and security enshrined in articles 22,25,28,29,492. Therefore, that committing or imposing a fine on him will not serve the ends of justice in the case.

9. This Court directed that the said application be canvassed by way of submissions which were wholly relied upon by the parties. Kosgei, Muriuki & Koome Advocates for the Applicants filed submissions dated 28th March 2019, while Mr. Donald Kipkorir of KTK Advocates filed submissions dated 2nd April 2019 on behalf of the Respondents and alleged contemnor.

The Determination

The Applicable Law

10. I have considered the pleadings and submissions made by the Applicants, Respondents and alleged contemnors, and need to clarify at the outset on the applicable law that now applies with regards to contempt of Court following the decision on 9th November 2018 of the High Court (J. Chacha Mwita) in **Kenya Human Rights Commission v Attorney General & Another, [2018] eKLR** . The said decision declared sections 30 and 35 of the Contempt of Court Act to be inconsistent with the Constitution and null and void, and also declared the entire Contempt of Court Act No 46 of 2016 invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution, and for encroaching on the independence of the Judiciary.

11. I am in the circumstances obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court's orders**.** It was in this respect observed in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya, HCMCA No. 13 of 2008,** that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law. In addition, where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

12. The applicable law as regards contempt of court existing before the enactment of the *Contempt of Court Act* was restated by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR**. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the Judicature Act which provided that:

> **"The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."**

13. This section was however repealed by section 38 of the Contempt of Act, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the Judicature Act, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the Judicature Act. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.

14. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

15. This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1,** and **Ochino & Another v Okombo & 4 others (1989) KLR 165** in this respect.

16. It is also the position and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice. See in this regard the decisions in **Kenya Tea Growers Association vs Francis Atwoli & Others , Nairobi High Court Constitutional Petition No 64 of 2010, Husson v Husson, (1962) 3 All E.R. 1056, Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497,** and **Davy International Ltd vs Tazzyman (1997) 1 WLR 1256** .

17. As regards culpability for contempt of court, the applicable principles are that no person will be held guilty of contempt for breaking an order unless the terms of the order are themselves clear and unambiguous as held in **Iberian Trust Ltd vs Founders Trust and Investment Co. Ltd (1932) 2 KB 913**. Furthermore, if the court is to punish anyone for not carrying out its order the order must in unambiguous terms direct what is to be done. It was held in **Radkin-Jones vs Trustee of the Property of the Bankrupt, (1965) 109 Sol. Jo. 334** that an order should be clear it its terms, and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain its precise obligation.

18. In addition, the act or omission constituting disobedience of an order may be intentional, reckless, careless or quite accidental and totally unavoidable. An intentional act may be done with or without an intention to disobey the order, and with or without an intention to defy the court. Therefore, the element of contumacy, which requires flagrant defiance of, the authority of the court, is no longer necessary to establish breach of a court order. It is now established that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order. See in this respect the English House of Lords decision in **Heatons Transport (St Helens) Ltd v Transport and General Workers Union (1973) AC 15.**

19. Lastly, on the applicable standard of proof, it was held in **Mwangi H.C. Wangondu vs Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998** that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

The Issues

20. There are three substantive issues arising. Firstly, is whether the alleged contemnor was served with, or aware of the orders issued by this court on 24th January 2019. Secondly, whether the Applicants have shown to the required standard that the alleged contemnor breached the said orders for committal orders to issue. Lastly, whether the Applicants merits the remaining orders in its application.

21. On the first issue of service of, or awareness of the orders by the alleged contemnor, the Applicants pointed out that the Respondents have not controverted or challenged the averments in the affidavit of service that the 1st Respondent's Senior Legal Officer read the orders and then refused to accept service, asking that their advocates be served instead. Further the Respondents advocates were in court when the orders were made. They relied on the Court of Appeal decision in **Shimmers Plaza vs National Bank of Kenya, (2015) eKLR** for the holding that knowledge of an order by the advocate of the alleged contemnor would suffice for contempt proceedings.

22. The Applicants further pointed out the law on contempt has developed as not to insist on personal service as mandatory requirement as long as knowledge has been demonstrated, and they relied on the case of **Justus Kariuki Mate & Another vs Nyaga Wambora & Another (2014) eKLR** for this proposition. Lastly, the Applicants submitted that the requirement for the endorsement of the penal notice on the order is also no longer a mandatory requirement. For this proposition they relied on the case of **Sahihi Housing Limited vs Ferdinand Ndungu Waititu & 4 Others (2014) e KLR** .

23. Further, that the Respondents' claim that the application lacks merit as its addressed against an office and not an individual is a misrepresentation of both facts and the law. That the application cites an individual and in any case there is nothing in law to that prevents them from citing an office or an institution for contempt where its officers have disobeyed a Court order. For this proposition they relied on the case of **Teachers Service Commission v Kenya National Union of Teachers & 2 Others, (2013) eKLR.**

24. Lastly, the Applicants submitted that the alleged contemnor is a senior legal officer of the 1st Respondent; he therefore cannot shirk his Responsibility by claiming that he is an independent in-house counsel a claim not even supported by any factual evidence.

25. The Respondents' submissions were that its trite law that there are essentially four elements that ought to be proved to make a case for civil contempt that; the terms of the order were clear and unambiguous and were binding on then Respondents; the Respondents had knowledge of or proper notice of the terms of the order; and the Respondents' conduct was deliberate. The Respondents contended that that the reliefs sought cannot be granted for the reasons that, the allegations in the application are without basis, that the instant application was prematurely instituted as no notice to show cause had been issued to either of the Respondent alleged contemnors as required by law, that there was no prominent notice, displayed on the order warning of the consequences of disobedience, and that the application was brought in the erroneous belief that the senior legal officer of the Respondent was authorised to receive Court orders on behalf of the university.

26. They relied on the case of **Isaac Karuri Nyongo & Another vs Ruiru Sports Club (2005) eKLR** for the holding that evidence of service of the order endorsed with a notice of penal consequences is required. Also cited for this position were the decisions in **Nyamodi Ochieng Nyamogo & Another vs Kenya Posts & Telecommunications Corporation (1994) Eklr** and **Sam Nyamweya & 3 Others vs Kenya Premier League Limited & 2 Others (2015) eKLR.**

27. I have in this regard perused the affidavit of service filed herein on 4th February 2019 and sworn on the same date by Muriuki Muriungi an Advocate of the High Court of Kenya, and which was relied upon in by the Applicant as evidence of service of the orders of this Court that were issued on 24th January 2019. I note that the said deponent stated in paragraph 5 that he gave the alleged contemnor the said orders, who read them, and directed him to serve the Respondents' advocates These averments were not controverted by the alleged contemnor. Therefore not only was the alleged contemnor served with the orders, he was also aware of the said orders.

28. As to whether the alleged contemnor having been served with the said orders, disobeyed them, the Applicants submitted that the alleged contemnor has been cited in his capacity as the 1st Respondent's senior legal officer and not personally as he claims in his affidavit. Further, that he was the concerned officer charged with relaying information and communication of a legal nature to the respective offices of the Respondents to ensure compliance. Further, that he has not shown or provided any evidence of the actions or step he took as the senior legal Officer to ensure compliance of the orders including communicating with the relevant university official's even upon becoming aware of the Court orders.

29. The placed reliance on the Court of Appeal case of **Isaiah Oduor Ochando vs Attorney General and Another, CA 212 of 2014** for the proposition that procedural protection ought not be construed in a manner that abrogates and renders the jurisdiction of the court to punish for disobedience of its orders practically inoperative, and that in appropriate cases and that the courts retains the discretion to dispense with procedural protection in the interests of justice and accordance with Article 159(2)d of the Constitution.

30. The Respondents' counsel on the other hand submitted that contempt is quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than proof on a balance of probabilities but not exactly beyond reasonable doubt. That the facts and evidence adduced ought to demonstrate clear wilful, flagrant or reckless disobedience if the Court order and the breach which the contemnor is cited ought to be precisely defined and satisfactorily proved which in the instant case is lacking. It was their submission that the Respondents were not served with any order and this is evidenced in the return of service and that service upon the alleged contemnor was ill advised. In concluding their submission they pointed out that the power to commit for contempt is one to be exercised with great care and the order should be adopted as a last resort and a high standard of proof Applies whenever there is an application for contempt.

31. Two questions are in this regard pertinent in the issue of the alleged contemnor's culpability. Firstly, is the question of who the orders of this Court were directed to, and therefore who was required to obey the same. The alleged contemnor averred that he had no jurisdiction and powers over the orders of which he is alleged to have disobeyed. The said orders that were issued on 24th January 2019, stayed the 3rd Respondents' decision in the letters dated 20th December 2019 *inter alia* suspending the 1st and 2nd Applicants from the 1st Respondent University and barring them from the University's precincts lecturers and activities.

32. The said letter which sent to both the 1st and 2nd Applicants had the same content and read as follows:

> **"…….SUSPENSION FROM THE UNIVERSITY, ITS PRECINCTS, LECTURES AND UNIVERSITY ACTIVITIES PENDING YOUR APPEARANCE BEFORE DISCIPLINARY COMMITTEE**
>
> **It has been reported that on Friday December 7, 2018, at around 1430 hours you were among a group of 20 students who went to SWA Main Halls of Residence outside Hall 9 wearing red berets. The group had alleged to have given notice to management on a peaceful orderly procession across all campuses. It is further reported that the group also went to Lower Kabete Campus on Saturday December 8, 2018 and also forced themselves into Kikuyu Campus by jumping over the gate on Sunday December 9, 2018.**
>
> **This conduct is in contravention of Part IV (b) (ii) (i) of the Regulations Governing the Organization, Conduct and Discipline of Students.**
>
> **You are well aware of the said regulations having signed and declared to abide by the same upon being admitted to and joining the university.**
>
> **NOTE: that by delegated authority to the Vice Chancellor in accordance with Part IV a) (ii) of the Regulations, I hereby suspend you from the University with immediate effect pending your appearance before appropriate disciplinary committee to face the above charges.**
>
> **You will be invited to appear before the disciplinary committee at a date and venue to be communicated to you when your attendance shall be required without fail.**
>
> **In the meantime, you are required and strongly advised to keep off from University precincts including lecture halls and activities of the University unless expressly authorized in writing by the Vice Chancellor or until such a time as the investigations/disciplinary process shall be finalized.**
>
> **You are further advised that this administrative suspension does not bar relevant state agencies and the university from instituting appropriate criminal charges against yourself.**
>
> **Yours sincerely,**
>
> **ISAAC M. MBECHE**
>
> **DEPUTY VICE CHANCELLOR (STUDENT AFFAIRS)**
>
> **AND PROFESSOR OF MANAGEMENT SCIENCE "**

33. The orders of this Court stayed the decisions in the said letter, and were therefore primarily addressed to, and bound the author of the said letter, who was the 3rd Respondent, and the principals on behalf of whom the 3rd Respondent was acting according to the terms of the letter, who were the 1st and 2nd Respondents. The Applicants in this respect did not show any role that the alleged contemnor played in the issuance of the said letter or indeed its enforcement.

34. The second question is whether, even if it were to be said that the alleged contemnor was served in his capacity as an authorized officer or employee of the 1st Respondent, the Applicants brought evidence to show that the alleged contemnor, while knowing of the said orders, did any acts that had the effect of subverting or breaching the said orders. The evidence by the Applicants in this respect is that the alleged contemnor instead of acting on the order, sent them to the Respondents' advocates. There was no evidence brought of the alleged contemnors actions or inactions in relation to the specific matters stated in the order. Moreover, the Applicants in their averments alleged that the persons who actually breached the orders were the Respondents' security officers, who were shown the orders but declined to act according to the said orders. The answers to the questions posed by this Court are therefore in the negative.

35. I accordingly find that the Applicant did not prove to the required standard of beyond reasonable doubt that the alleged contemnor was in breach of the orders issued by this Court on 24th January 2019, and the orders sought of committal for contempt of court cannot lie.

36. The last issue is whether the outstanding prayers in the Notice of Motion that an order do issue directed specifically to the Deputy Vice Chancellor (Student Affairs), the Chief Security Officer, Main Campus and Chief Officer/Head of Security at Parklands Campus, to allow the Applicants into the university premises/precincts unconditionally and with immediate effect are merited. The answer is again in the negative for various reasons.

37. Firstly, these are final mandatory orders which cannot issue at an interlocutory stage, unless and until the Applicants has shown that they have a clear case to warrant the issue of such an injunction as held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**. In any event there are already orders issued by this Court preserving the status quo in this regard, and these orders are to this extent also superfluous.

38. Secondly, the orders are also directed at persons who are not party to this application and have not been given an opportunity to be heard, particularly as to their responsibilities and duties towards the Applicants, and to grant such orders would therefore be unfair and in breach of the rules of natural justice. Lastly, as the orders sought are not available, there are no orders required to be enforced by the OCS

39. In the premises all the prayers in the 1st and 2nd Applicants' Notice of Motion application dated 29th January 2019 as amended on 4th February 2019 are denied, and the said Notice of Motion is hereby dismissed.

40. There shall be no order as to costs.

41. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF JUNE 2019

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2019

J. MATIVO

JUDGE