



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 163 OF 2015

REPUBLIC.....APPLICANT

VERSUS

SPORTS KENYA.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE:

CAROLINE MUNGAI & 26 OTHERS

RULING

The Applications

1. The ex parte Applicants herein are twenty six (26) employees who served at the Department of Sports at the then Ministry of Youth Affairs and Sports, before the commencement of the Sports Act of 2013. They commenced judicial review proceedings herein seeking orders of mandamus against the Sports Kenya (the 1st Respondent) and the Public Service Commission (the 2nd Respondent), seeking to serve with the 1st Respondent, or be redeployed by the 2nd Respondent in line with the provisions of the 4th Schedule to the Sports Act 2013. The parties thereupon recorded a consent on 10th May 2016 which was adopted as an order of this Court on 22nd June 2016.
2. The Applicants have now filed an application by way of a Notice of Motion dated 12th April 2019 seeking orders that the Director General, Sports Kenya be cited for contempt of this Court and be committed to civil jail for 6 months, for defying in flagrant and contemptuous breach of the Court's orders of the 22nd June 2016, and that the Respondents be condemned to pay the costs of this application.
3. The application was supported by an affidavit sworn on 12th March 2019 by Elizabeth Yatch, the 5th Applicant, who explained that it was a term of the said consent entered on 10th May 2016 that the 1st Respondent would carry out suitability tests for the Applicants by 31st May 2016 and that the suitability tests were indeed carried out albeit belatedly. Further, that it was also a term of the consent that the 1st Respondent communicates to the respective applicants the results of the suitability tests latest by 15th June 2016 and concurrently with such communication, all successful Applicants be issued with appointment letters.
4. However, that the 1st Respondent has not communicated the results of the suitability test to the Applicants nor issued them with appointment letters, and that the 1st Respondent's advocate on recorded intimated to the court that they were waiting for funds from Treasury to pay salaries. Lastly, the Applicants stated that the 1st Respondent and its Director General are aware of the orders of court made on 22nd June 2016.

The Response

5. The alleged contemnor, Pius Metto, responded to the said application on his own behalf and on behalf of the 1st Respondent, by way of a replying affidavit sworn on 26th March 2019. He stated that he is the Director General of the 1st Respondent, and that the consent order of 10th May 2016 was recorded in complete good faith. Further, that the 1st Respondent had every intention of complying with it since the absorption of the Sports officers would have assisted the 1st Respondent realise its statutory mandates.

6. However, that there has not been satisfactory funding from the National Treasury to cater for the anticipated recruitment of regional Sports Officers. He annexed the Government of Kenya printed estimates for Financial Year 2016/2017 and 2017/2018 in support of this averment. He also stated that the 1st Respondent has on several occasions written to the Principal Secretary of the Ministry of Sports, Culture and Arts seeking support from to enable compliance with the consent order, and he attached copies of the said letters. Mr. Metto averred that the National Treasury responded to the Ministry in a letter dated 11th December 2017, stating that field sports activities and the resources thereof had been devolved, and the national government was therefore not able to fund the proposed transfers as there would be no money to pay salaries.

7. The deponent further averred that there had been reduced income generation from the 1st Respondent's facilities, and that its current organizational structure does not provide for the position of the Sports officers. Further, that the finalization of the organizational structure which is under way will provide an indication of the number of sports officers are required. Therefore, that while the 1st Respondent has made efforts to implement the consent order, there are other external forces that are making it difficult to comply. In addition, that there is no prejudice being suffered by the sports officers who are still in employment and drawing their salaries.

8. Lastly, the deponent stated that it is for the above reasons that he has been unable to honour the terms of the consent order dated 10th May 2016. Further, that contempt of court proceedings are intended to punish parties who deliberate and willingly disobey court orders, unlike in the instant case, where the inability to obey the court order is not intentional and is well explained.

The Determination

9. This Court directed that the instant application be canvassed by way of submissions. S.B. Otieno & Company Advocates for the *ex parte* Applicant filed submissions on 19th July 2019, while Waruhiu, KÓwade & Ng'ang'a Advocates for the Respondents filed submissions dated 9th October 2019.

10. The *ex parte* Applicant submitted that the 1st Respondent's Director General acknowledged being served with the application for contempt in his replying affidavit, and that the Applicants are yet to be issued with appointment letters. On the reasons given by the 1st Respondent for failure to comply with the court order is lack of funds, that this reason was rejected by the Court when it ordered that a notice to show cause issue against the Director General of the 1st Respondent for contempt proceedings to be commenced against him. Further, that since the consent order of 10th May 2016 adopted by the court on 22nd June 2016, the national budget has been read at least four times and the 1st Respondent has failed to factor the Applicants' salaries in the said budgets. In addition, that the 1st Respondent's Director General has failed to demonstrate that he has taken any steps to ensure that resources needed to appoint the Applicants are transferred back to the national government to fund the proposed transfers, and has not even attempted to move the court for appropriate orders which would enable it to settle its obligations.

11. In conclusion, the Applicant's advocates submitted that insufficient reasons have been advanced for non-compliance with this Court's orders, and that the person who is legally bound to ensure that the court order is complied with is the Director General of the 1st Respondent in line with the decisions in **Shah vs Attorney General (No.3), (1970) EA 543** and **Republic vs The Attorney General & Another ex parte James Alfred Koroso, Nrb H.C. Miscellaneous Application NO. 44 of 2012.**

12. The 1st Respondent and alleged contemnor on the other hand relied on various definitions of civil contempt and its elements in various texts and judicial authorities, including the decisions in **Katsuri Limited vs Kapurchand Depar Shah, HCCC No. 25 of 2013** and **Republic vs Principal Secretary Ministry of Defence, HC JR No. 276 of 2015.** They submitted that it was never their intention to disobey the consent it entered into voluntarily and which was intended to assist it further its interests. Further, that the 1st Respondent has explained and submitted correspondence between itself, its mother ministry and the National Treasury to show that its unable to perform the consent order due to unavailability of funds, and the difficulties it has faced in complying with the court order, as required of it by the decision in **Republic vs the Kenya School of Law & Another HCCC No. 58 of 2014.**

13. In conclusion, the alleged contemnor urged the Court to find that he has not wilfully and deliberately disobeyed the consent order, but that the inability to perform the same has been well and sufficiently explained and that it affords a good defence to the application for contempt.

14. I have considered the pleadings and submissions made by the Applicants, Respondents and alleged contemnor, and need to clarify at the outset the applicable law with regards to contempt of Court. The power of this Court to punish for disobedience of its orders is expressly provided for in section 36 (1) of the High Court (Organization and Administration) Act which provides as follows:

“(1) A person who –

(a) assaults, threatens, intimidates or willfully insults a judge, judicial officer or a witness, involved in a case during a sitting or attendance in a court, or while the judge, judicial officer or witness is travelling to and from a court;

(b) willfully and without lawful excuse disobeys an order or directions of the court in the course of the hearing of a proceeding;

(c) within the premises in which any judicial proceeding is being heard or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being heard or taken;

(d) having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended refuses to be sworn or to

make an affirmation, or having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being heard or taken after the witnesses have been ordered to leave such room;

(e) causes an obstruction or disturbance in the course of a judicial proceeding;

(f) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority taken;

(g) publishes a report of the evidence taken in any judicial proceeding that has been directed to be held in private;

(h) attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he or she has given evidence in connection with such evidence;

(I) dismisses a servant because he or she has given evidence on behalf of a party to a judicial proceeding; or

(j) commits any other act of intentional disrespect to any judicial proceedings, or to any person before whom such proceeding is heard or taken, commits an offence.

15. **Section 39 (2) (g) of the Act** enjoins the Chief Justice to make Rules to provide for, among other things, the procedure relating to contempt of court. However, the rules to regulate the commencing and prosecuting of contempt of court applications under the Act are yet to be made. The law that previously applied in this regard was the Contempt of Court Act of 2016, until the decision of the High Court (J. Chacha Mwita) made on 9th November 2018 in **Kenya Human Rights Commission v Attorney General & Another, [2018] e KLR**. The said decision declared the Contempt of Court Act 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.

16. I am in the circumstances obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court 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.

17. 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.”

18. This section was repealed by section 38 of the Contempt of Act of 2016, 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.

19. 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. 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.

20. 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** .

21. The first issue therefore for determination in the present application arising from the requirement of knowledge of the orders, is whether the alleged contemnor was served with, or aware of the orders issued herein on 16th June 2018. This Court notes that the Applicant did not annex any copies of the said orders alleged to have been disobeyed, or of evidence of service of the same on the alleged contemnor. However, this fact of lack of personal service notwithstanding, the alleged contemnor and 1st Respondent admit to being aware of the said orders in their replying affidavit, wherein they state that they recorded the consent order in good faith, and intended to comply with it. The awareness of the orders by the 2nd and 3rd Respondents is therefore not disputed.

22. The issue in dispute is whether the alleged contemnor has disobeyed the said orders and is liable to be committed for contempt of court. As regards this issue, the applicable legal principles on culpability for contempt of court 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 in 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.

23. In the present application, the order alleged to be breached was recorded on 10th May 2016, and required the 1st Respondent to carry out suitability tests on the Applicants, communicate the results thereof, and issue those who were successful with appointment letters, and for the remaining Applicants to be redeployed to the Public Service Commission. The Applicants confirm that there has been part compliance, with the suitability tests having been carried out. The outstanding orders not complied with relate to the issue of appointment letters by the 1st Respondent.

24. The question therefore which needs to be answered is whether the alleged contemnor has breached the order to issue appointment letters to the suitable Applicants. In this regard, 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 vs Transport and General Workers Union (1973) AC 15**.

25. On the applicable standard of proof required to establish such a breach, it was held in **Mwangi H.C. Wangonde 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. Likewise, it was held as follows by the Court of Appeal in **Woburn Estate Limited vs Margaret Bashforth [2016] eKLR**:

“We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning In Re Bramblevale Ltd [1970] 1 CH 128 at page 137 that;

“ A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”

26. The alleged contemnor has gone to great lengths to explain the actions they have taken to comply with the orders given by this Court, and the budgetary and financial difficulties they face in this regard. This Court finds that in the circumstances non-allocation of funds is an acceptable defence or justifiable excuse for non-compliance with the said orders, as no consideration was given to, nor were any specific orders was given by this Court as regards the financial aspects of compliance of the said orders.

27. In addition, the 1st Respondent's lack of action to take any steps to arrange for funding, if any, can only amount to contempt if there were specific orders or directions given in this regard by the Court, upon being moved by either party in an effort to implement the consent orders. No such orders or directions were given by this Court as regards securing of financial resources by the 1st Respondent, and the alleged contemnor cannot be held to be in contempt for failure to secure funding.

28. In conclusion, I note that it is evident that the enforcement of the consent orders entered herein on 10th May 2019 can only be possible upon additional remedies being granted in this respect by the Court. In the premises the prayers in the Applicants' Notice of Motion dated 12th April 2019 are denied, and the said Notice of Motion is dismissed. There shall be no order as to costs, as the circumstances giving rise to these orders are not of the Applicants' own making.

29. Orders accordingly.

DATED AND SIGNED THIS 25TH DAY OF NOVEMBER 2019

P. NYAMWEYA

JUDGE

DELIVERED ON BEHALF OF JUSTICE P. NYAMWEYA AT NAIROBI THIS 25TH DAY OF NOVEMBER 2019

J.M. MATIVO

JUDGE