



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 365 OF 2012

BETWEEN

ELIUD NYAUMA OMWOYO.....1ST PETITIONER
WINFRED NDINDA MAITHYA.....2ND PETITIONER
AGNES KAJUJU MBURU.....3RD PETITIONER

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

RULING

1. This is a ruling on contempt of court application dated 1st November 2016 by *Eliud Nyauma Omwoyo*. The application is supported by the applicant's affidavit sworn on 1st November 2016 and the grounds on the face of the application. The applicant was the 1st petitioner herein and he seeks the following orders;

i. Spent

ii. That this honourable Court be pleased to cite the respondent and or the respondent's principal officers in charge of Students disciplinary matters namely; the Vice chancellor, the Academic Registrar, the Deputy Vice-chancellor Academics and the Dean in charge of Students Affairs or such other officer found culpable for contempt of Court for violating or disobeying the Court directive issued by this Court in its judgment dated 12th September 2014.

iii. That the aforesaid officers of the Respondent be committed to civil jail for period(sic) of Six(6) months or such other period of time or other sanction as the Court may deem fit for the said contempt.

iv. That a declaration be made that the disciplinary proceedings conducted by the respondent against the 1st Petitioner/applicant on 6th November 2014 and the subsequent appeal on 22nd July 2015 against the findings of the disciplinary Committee were a nullity for contravening the specific directives of the court issued in this petition on 12th September 2014 as regards the period within which the proceedings were to be conducted and the manner of conduct of the proceedings to accord with the law.

v. *That a declaration that the decision of the respondent to discontinue the 1st petitioner from studying at the respondent University is too punitive, unreasonable and unconstitutional as it foes against the 1st petitioner's legitimate expectation to acquire university education.*

vi. *That this honourable court be pleased to substitute the decision of the respondent's Students disciplinary Committee of 6th November 2014 and that of the Students disciplinary appeals Committee of 22nd July 2015 with an order that the 1st respondent re-sits for the Unit AEN 401 whose results the respondent alleges was tempered with or such other suitable order the Court may deem fit to grant.*

2. According to the depositions in the affidavit, **Omwoyo** together with his co-petitioners had filed the petition challenging the respondent's decision to discontinue them from the university. After the petition was heard, the court, **Lenaola J** (as he then was) in its judgment delivered on 12th September 2014 found that the petitioners' rights had been violated in the manner disciplinary proceedings had been conducted. The court ordered that the process be done a fresh in accordance with the law but within 45 days.

3. The applicant deposed that on 22nd October 2014, he received a letter dated 16th October 2014 from the respondent inviting him to appear before the Students' Disciplinary Committee on 30th October 2014. He deposed that the said meeting did not take place as scheduled and that on 3rd November 2014 he again received a letter dated 31st October 2014 inviting him to appear before the committee on 6th November 2014.

4. The applicant deposed that the two letters of 16th October 2014 and 31st October 2014 were similar in content to the previous letters of 30th May 2012 and 14th June 2012 which the court had found to have had violations except minor changes on venue and changes in grade from E to B. According to the applicant, the letters did not comply with the directions given by the court in its judgment, that the applicant had not been accorded a fair administrative action in terms of Article 47(1) of the Constitution since the letters did not contain particulars of the allegations.

5. The applicant further deposed that the respondent did not comply with the courts' direction in the judgment and conducted disciplinary proceedings on 6th November 2016 outside the 45 days and made a decision to discontinue him without following the law as directed by the court. According to the applicant, no evidence was tendered in support of the allegations or charges levelled against him and the respondent did not call evidence to confirm the applicants' participation in the change of grades.

6. The applicant deposed that the investigation report that was relied on to confirm that he had influenced grades was neither availed to him nor was his examination - answer sheet script. He also deposed that the offence he was charged with namely; ***"Influencing tampering with online grades unit AEN 401"***, is not one of the examination irregularities stipulated in the respondent's regulations 2010-2012 catalogue.

7. The applicant deposed that he was not called to respond to any of the particulars of the charge during the disciplinary proceedings and that the respondent did not demonstrate that he had access to the examination results servers. He deposed that he had requested verbatim proceedings of 6th November 2014 to no avail.

8. The applicant went on to depose that he believes the proceedings conducted on 6th November 2014 were a sham, illegal and were pre-determined to achieve a particular result hence they violated his right to fair administrative action. In his view, he deposed, the respondent neither conducted the disciplinary proceedings within the period specified by the court nor did it seek extension of time to do so. He deposed that he appealed against the Disciplinary Committee's decision which was heard on 22nd July 2014 but it was also unsuccessful.

9. The applicant deposed that the disciplinary proceedings were conducted contrary to the court's direction, that the respondent acted in contempt of court and therefore he has sought to have the

respondent's Principal Officers namely; Vice Chancellor, Registrar in charge of Academics, Registrar in charge of Administration and Dean of Students committed to civil jail for that contempt of court.

10. The respondent filed a replying affidavit sworn by **Prof. Wangari Mwai**, Deputy Vice Chancellor (Administration) on 16th February 2017 and filed in court on the same day. **Prof. Mwai** deposed that the petitioner who was a student at the respondent University was suspended for tampering with and manipulating his examination results from Grade E to B in one unit. It was deposed that the applicant challenged that decision and the court in its judgment of 12th September 2014 directed that fresh disciplinary proceedings be conducted. **Prof. Mwai** deposed that in order to comply with the judgment, the applicant was invited to appear before the Disciplinary Committee on 30th October 2017 by letter dated 16th October 2014.

11. However, **Prof. Mwai** deposed the disciplinary hearing did not proceed on 30th October 2014 due to quorum hitch and was postponed to 6th November 2014 when proceedings were conducted and the applicant gave oral submissions. The disciplinary committee found the applicant guilty and he was notified of the committee's decision by letter dated 17th December 2014 and was advised of his right of appeal.

12. **Prof. Mwai** further deposed that the applicant lodged an appeal against the disciplinary committee's decision by letter dated 24th April 2015 and by letter dated 7th July 2015, the applicant was asked to appear before Appeal Committee on 10th July 2015, that the committee sat on 22nd July 2015 when the applicant made oral submission and presented a written statement. The appeal was however dismissed. It was deposed that the petitioner was given a fair hearing and that his rights were not violated. In **Prof. Mwai's** view, the application more or less seeks to reopen the petition as it seeks prayers that were declined in the earlier petition.

13. During the hearing for the application, **Mr. Onyoni**, learned Counsel for the applicant, submitted that the Court had in its judgment directed the respondent to conduct disciplinary proceedings in accordance with the law and in any case within 45 days from the date of that judgement. Learned counsel submitted that the respondent committed contempt of Court in that whereas it had been directed to conduct disciplinary proceedings within 45 days, it did not do so, and did not comply with the directions of the Court that the disciplinary proceedings be conducted in accordance with the law which he says did not happen.

14. Learned counsel gave an example of the letters which were sent to the applicant submitting that they were similar to those that had been found to have contained no reason or particulars to support those allegations. Mr. Onyoni also submitted that there was no sufficient notice to the applicant. Learned Counsel contended that if the respondent was not able to conduct disciplinary proceedings within 45 days as directed by the Court, it ought to have sought extension of time which it did not. He also submitted that the allegations the applicant faced did not constitute grounds for disciplinary proceedings in terms of the respondent's regulations. He went on to contend that evidence was not supplied to the applicant neither was it availed during the hearing. Learned Counsel contended that the applicant faced allegations that did not exist in the university regulations and therefore prayed that the applicant be allowed. He relied on the case of **Joseph Ndungu Kagiri v Republic**[2016]eKLR and **Africa Management Communication International Limited v Joseph Mathenge Mugo and another**[2013]eKLR

15. **Mr. Wetangula**, learned Counsel for the respondent on his part submitted that some of the prayers sought namely; 4, 5 and 6, cannot be granted in the absence of a petition. Counsel contended that the application being for contempt, it cannot go hand in hand with those prayers.

16. Regarding contempt, **Mr. Wetangula** submitted that there was no evidence that the respondent unlawfully defied Court orders. According to learned Counsel, the respondent informed the applicant to appear before the committee but the committee could not sit on the appointed day due to quorum hitch, but the applicant was eventually heard. Learned Counsel submitted that there was clear intention on the respondent to comply with the Court's directions.

17. He submitted that even though the time within which the disciplinary proceedings were conducted was outside the 45 days, this was not intentional on the part of the respondent. He contended that the letters to the applicant set out the charge/ allegations and argued that the power to punish for contempt is meant to ensure that the rule of law is upheld at all times. However, counsel contended, it had not been shown that the respondent wilfully disobeyed the Court order to warrant the applicant being granted. Counsel relied on the case of **Board of Governors Moi High School Kabarak v Malcoim Bell & Another** Supreme Court Petition, Nos 6&7 of 2013, **Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others** [2015 eKLR] and **Kenya Data Network Limited v Kenya Revenue Authority** [2013 eKLR]

18. I have considered the application, the supporting affidavit and grounds in support thereof contained on the face of the application. I have also considered the replying affidavit and submissions by Counsel for both parties. This is an application for contempt of Court seeking to commit the respondent's officials to civil jail for contempt on grounds of disobedience of the court's judgment. The applicant was a student in the respondent University. He was alleged to have been involved in examination irregularities and was taken through disciplinary proceedings after which he was discontinued from the university.

19. He challenged the disciplinary proceedings leading to his discontinuation in Court, and the Court determined that those proceedings did not comply with the Constitution and directed the respondent to conduct fresh disciplinary proceedings in compliance with the law within 45 days from the date of that Judgement that is from 12th September 2014.

20. The applicant has contended that the respondent violated the Court order in two respects. First that it did not conduct the disciplinary proceedings within 45 days as ordered by the Court. Second, that the letters sent to him were not different from those the Court had found to have failed to comply with the law. The respondent on the other hand maintained that it complied with the Court order and followed the law in conducting the subsequent disciplinary proceedings and therefore did not commit contempt of the Court.

21. Contempt is conduct that despises, defies or disobeys authority. It is the wilful disobedience of judgment, decree, order or direction of the court. (***See section 4 of the Contempt of Court Act, 2016***). Contempt is punishable because ***it impairs fair administration of justice, the rule of law and development of society and good order***. For that reason, Courts will punish for contempt in order to maintain its dignity, authority, the rule of law and above all the administration of justice. That therefore, calls for obedience to court orders at all costs.

22. In the case of **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another** [2005]KLR 828, **Ibrahim J** (as he then was) underscored the importance of obeying court order when he stated:-

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void”.

23. Contempt proceedings are ***quasi criminal*** in nature and when proved the contemnor may lose liberty, Courts therefore, require that contempt be proved satisfactorily and at a higher degree than that of balance of probabilities. Courts will not hesitate to punish for contempt where it is proven that there was wilful and intentional disobedience of a court order. Moreover, court orders should be obeyed without qualification unless otherwise reviewed and or set aside. That calls for strict proof that the alleged contemnor actually wilfully disobeyed the court order.

24. In the case of **Katsuri Limited v Kapurchand Depor Shah** [2016] eKLR, **the court** cited the South African case of **Kristen Carla Burchell v Barry Grant Burchell** (Case No 364 of 2005), where it was

stated that ***in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove, the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order.*** There must be failure to comply with the court order and that failure must be wilful and intentional.

25. Article 159 of the Constitution grants judicial authority to courts to be exercised on behalf of the people. In that regard, a decision made by a court of law is made on behalf of the people and must therefore, be obeyed in order to enhance the rule of law, administration of justice and good order. In the case of ***Nthabiseng Pheko v Ekurhuleni Metro politan Municipality & Another*** CCT 19/11(75/2015). ***Nkabinde,J***, writing for the Constitutional Court of South Africa, had this to say on the importance of obeying court orders;

“The Rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts’ orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”

26. In the Canadian case of ***Canadian Metal Co. Ltd v Canadian Broadcasting Corp***(N0.2 [1975] 48D.LR(3d) ***O’Leary J*** sounded the warning that;

To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society”.

27. Still in Canada, ***Cramwell J*** of the Supreme Court of Canada writing in ***Carey v Laiken*** [2015]SCC17 stated that;

“Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect... the purpose of contempt is first and foremost a declaration that a party has acted in defiance of a court order.”

28. The Supreme Court of Nigeria on its part emphasized on why the court must protect its authority and dignity and punish for contempt. In the case of ***Louis Ezekiel Hart v Chief George 1 Ezekiel Hart*** SC 52/2983 (2nd February 1990) the Court stated;

“Where an individual is enjoined by an order of the court to do or to refrain from doing a particular act, he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders.”

29. Back home, in the case of ***Commercial Bank of Africa v Ndungu*** (1990 – 1994) EA 64 the Court of Appeal echoed the principle that it is a fundamental rule of law that court orders be obeyed. While in ***Hon. Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another*** [2014]eKLR the Court of Appeal again stated that ***the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and due administration of justice.*** The Court of Appeal went on to cite its own decision in the case of ***Refrigeration and Kitchen Utensils Ltd v Gulabchand Poptal Shah & Another*** (Civil application No 39 of 1990) where it was stated that ***it is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times.***

30. From the long line of decisions referred to above, the court’s singular duty is to ensure that its orders,

decisions, judgments and or directions are obeyed for the maintenance of the rule of law, administration of justice, good order and development of society. It is also the position held by courts that the power to punish for contempt should be exercised cautiously and with great restraint and only as a last resort to enforce its orders –*Carey v Laiken* (supra).

31. According to the record, the respondent was directed to conduct disciplinary proceedings a fresh and within 45 days. The respondent sent a letter to the applicant informing him that it would hold disciplinary proceedings on 30th October 2014. That date was within the 45 days of the Court's direction. However, both the applicant and respondent agree that disciplinary proceedings did not take place on the material date. The explanation given by the respondent was that there was no quorum since some members of that committee were involved in other activities. Eventually disciplinary proceedings were conducted on 6th November 2014 and the applicant attended and made his representations.

32. The applicant's representations were duly considered and he was found culpable. Both parties also agree that the applicant being dissatisfied with the decision of the disciplinary committee exercised his right of appeal and appealed to the Disciplinary appeals Committee. He also attended during the hearing of his appeal which was however dismissed. He was therefore discontinued from the university after the conclusion of the disciplinary process. He filed a petition before this court being ***Petition No. 40 of 2015***, but it was dismissed on 7th of September 2016 for being ***res judicata***.

33. It is strite that for one to be found to have committed contempt, his/her actions and or conduct must amount to wilful and intentional disobedience of the court order. The applicant had a duty to show to the satisfaction of the court that the respondent acted wilfully and with the intention of disobeying the court order. However, looking at the material before court and the circumstances of this case, there was no evidence that the respondent wilfully and intentionally disobeyed the court's judgment and failed to hold disciplinary proceedings as directed by the court.

34. The applicant was invited to attend disciplinary proceedings within the timelines set by the court. The first disciplinary hearing did not however materialize, not because of the respondent's failures but due to lack of quorum. The respondent rescheduled the meeting soon thereafter and disciplinary proceedings were conducted on 6th November 2014. In such circumstances, it cannot be correctly argued that the respondent committed contempt of Court because there was no wilful and intentional disregard to act as directed by the court.

35. The applicant further argued that the letters the respondent sent inviting him to attend disciplinary proceedings did not contain reasons and that he was not given sufficient time in terms of Article 47(1) of the constitution. The applicant's contention, in my view, is too late to be of assistance to him. He received letters that he contends did not have reasons and that the period given was short. He did not complain at that time. He did not move to court to contend that the respondent was acting contrary to its judgment and was not doing things as directed by the court. Instead, he appeared before the disciplinary committee and went through the process up to appeal stage. After he lost the appeal, he moved to court but his petition was dismissed for being ***res judicata***. It was after that judgment that he came to this court with this application contending that the respondent acted in contempt of the court's judgment.

36. The applicant should have taken the first opportunity once he thought the respondent was in contempt. It appears to me that the applicant is trying his luck after losing the appeal and petition. Moreover, I have looked at the application and in my respectful view, it is more of an appeal and or a petition than an application for contempt. Looking at the orders sought in the application, the applicant is more aggrieved that no evidence was adduced against him during the disciplinary proceedings to connect him with the alleged tampering with grades and that the charge he faced was not an examination irregularity than a complaint that the respondent violated the judgment of the court and is therefore in contempt.

37. Having given due consideration to the application and considering the facts and the law, I am not satisfied that it has merit. Consequently, the application dated 1st November 2016 is declined and dismissed with no order as to costs.

Dated, Signed and Delivered Nairobi this 15th Day of December 2017

E C MWITA

JUDGE