REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 746 OF 2004

STANLEY KAMANGA NG'ANG'A……PLAINTIFF/APPLICANT

VERSUS

THE KENYA NATIONAL LIBRARY

SERVICES BOARD……..…. DEFENDANT/RESPONDENT

RULING

1. The Application, the Prayers, the Depositions

The plaintiff's application by Notice of Motion dated 4th August, 2004 was filed on 12th August, 2004. It was brought under section 5 of the Judicature Act (Cap. 8), Order L rule 1 of the Civil Procedure Rules, and sections 3A and 63 of the Civil Procedure Act (Cap. 21). The plaintiff's substantive prayer was:

"THAT the Court be pleased to cite and punish the defendant and its officers and agents, namely the Kenya National Library Services Board, Mr. Samuel M. Maitha the Acting Director and Mary W. Stevens for contempt of this Court's order of 14th July, 2004."

In the supporting grounds it is stated that the Court had on 14th July, 2004 issued a temporary injunction restraining the defendant by itself, its officers and/or agents or otherwise howsoever from transferring, retiring, terminating and/or dismissing the applicant from his employment or interfering with the employment of the applicant, pending the hearing of the application ***inter partes*** on 30th July, 2004. It is contended that the said orders were made in the presence of the respondent's advocates, and the same were formally extracted and served together with a Penal Notice on the respondent and its said officers. It is asserted that the respondents obeyed the order partly for one day only, but thereafter have deliberately disobeyed the said orders. It is stated further that it is essential for the maintenance of the rule of law and good order, that the dignity and authority of the Court be upheld.

The evidentiary basis of the application is in the affidavit of ***Stanley Kamanga Ng'ang'a*** (the plaintiff).

The plaintiff deposes that, after he filed suit on 8th July, 2004 he brought an application under certificate of urgency seeking injunctive orders to restrain the defendant and its agents from, ***inter alia***, interfering with his employment. The hearing was scheduled to take place on 14th July, 2004, and both advocates were in attendance on that occasion. The hearing did not, however take place as an adjournment was sought from the respondents' side. On that occasion counsel for the applicant applied for and obtained an *interim order of injunction*, pending further hearing. The plaintiff avers that after the orders of the Court had been served with penal notice, he reported to his office at the premises of the defendant, on 15th July, 2004 and gave copies of the Court order to the senior officers, explaining to them the essence of the same.

On 16th July, 2004 the plaintiff received information that ***Mary W. Stevens***, the former chairperson of the board, and the acting director ***(Mr. Samuel Maitha)*** had issued instructions to security staff to close the gates and prevent the plaintiff from entering the premises. The acting Director***, Mr. Maitha*** is said to have confirmed to the applicant the intention to use violence against him if he reported to work; and when later he drove to his place of work he would not be allowed to enter. The applicant said both ***Maitha*** and ***Mary Stevens*** had prevented him from reporting to work, and that ***Mary Stevens*** after reading the Court orders, had told a security guard, ***Billy Mambo Kariuki,*** that the board would not obey those orders. The applicant avers that he had later telephoned the acting Director, who told him the in-coming board had issued instructions that he be not allowed to continue working. He deposed that -

"The defendants have interfered and continue interfering with my employment by *inter alia* barring me from entering my work premises and discharging my duties, failing to pay my due salary and benefits and withholding other allowances and benefits due to me."

Before filing the proceedings, the applicant avers, his advocates on record did serve a notice upon the Attorney-General, of the intention to bring contempt proceedings.

The replying affidavit by ***Mrs. Deborah A. Nyabundi*** dated 1st September, 2004 was filed on the same date. She depones that she is the acting Director of the Kenya national Library Services. She avers that the applicant had reported to the office on 15th July, 2004 without any notice to the members of the board who were then holding a meeting. She depones that the applicant had been transferred to the Ministry of Trade some time before he filed his application of 5th July, 2004; hence he was expected to be at his new work station. The deponent had read and understood the Court's order dated 14th July, 2004 which carried an injunction against -

(i) transferring the applicant;

(ii) retiring the applicant;

(iii) terminating the applicant's employment;

(iv) dismissing the applicant;

(v) interfering with the employment of the applicant.

The deponent avers that by the time the applicant filed his application of 5th July, 2004 and by the time the Court orders of 14th July, 2004 were served, the Permanent Secretary and Head of the Civil Service and Secretary to the Cabinet had *already directed the transfer* of the applicant, by letter dated 27th January, 2004; and in the circumstances the defendant had *no authority to re-transfer the applicant*. Several Government letters facilitating the said transfer were subsequently dispatched to the applicant, notably on 5th and 20th February, 2004. The deponent avers that in the light of such superior arrangements by the responsible Government offices, it did not in any manner lie with the defendant to retire, terminate or dismiss the applicant or otherwise interfere with his employment. The deponent understood the Court Order to mean, in the circumstances -

"THAT what we could do effectively was to abide by the Court Order by *not appointing another Director which action has not been taken to-date."*

The deponent avers that the applicant omitted in his depositions to disclose the fact that "he had not undertaken any duties at the Kenya National Library Services since his transfer was effected in early January, 2004." The deponent deposes that the members of the defendant board have not knowingly or otherwise acted in contempt of the Orders dated 14th July, 2004; and they have clearly noted that "the Order did not reverse the transfer of the applicant." She depones that the members of the defendant Board have taken note that the "defendant was under clear and unequivocal direction of the Government", as

demonstrated by the letter of the Directorate of Personnel Management dated 8th April, 2004. The said letter which is annexed to the affidavit, reads in part as follows:

"…the transfer/redeployment has been done by the Government, being the overall authority on employment/deployment of Chief Executives, Chairmen and Members of various Boards, Councils and Committees. It is not therefore in the powers of your Board to discuss or challenge the move. Mr. Ng'ang'a is also required to take up his new assignment immediately and raise any issues with the Permanent Secretary in charge."

Mrs. Nyabundi avers that the applicant's entry at the premises of the defendant on 15th July, 2004 had "caused quite a commotion among members of staff and a restive situation which threatened to degenerate into chaos developed." It became necessary, in the circumstances, for the applicant to be kept physically out of the premises while preparations were being made to respond to his application of 5th July, 2004. The deponent avers that such action was taken in the interest of good order, rather than to defy the Court's Orders which the defendant Board had honestly understood to "preserve the ***status quo*** obtaining." The deponent has received information from the defendant's counsel, which she believes to be true, that the application of 5th July, 2004 "did not seek to obtain a mandatory order of injunction against the defendant."

Further support for the respondent's position is in the supplementary affidavit by ***Mrs. Mary W. Stevens*** dated and filed on 10th September, 2004.

Mrs. Stevens depones that upon becoming aware of the order dated 14th July, 2004 the defendant immediately ceased any further plans to employ a new director, pending the hearing and disposal of the plaintiff's application dated 5th July, 2004. She avers that the defendant was not the originator or executor of the transfer of the plaintiff as director of the Kenya National Library Services, as the action was taken by the Central Government through the Head of the Civil Service and Secretary to the Cabinet. The Permanent Secretary of the Ministry of Gender, Sports, Culture and Social Services had effected the transfer by letter dated 20th February, 2004; and members of the defendant believed that the applicant had accepted the transfer since his annual leave (which he duly took) had been approved as preceding his reporting to his new duty station. It is deponed that, by 15th July, 2004 the applicant had not been in office as Director of the Kenya National Library Services for more than five months; and his leave is believed to have ***expired on 8th June, 2004***. It is not known to the defendant where the applicant was, as officially he was expected to report to his new place of posting; and such was the defendant's state of knowledge until the applicant filed the application on 5th July, 2004. The deponent averred that the respondent's understanding of the order of 14th July, 2004 was that the ***status quo*** was to be maintained; and so the applicant *should not have come to make a re-entry at the office as he did on 15th July, 2004*. The deponent avers that negative reactions had been expressed by a section of the employees of the defendant when the applicant appeared at the offices, and "it became necessary to bar him from entering the premises for his own safety…" The deponent refuted the claim in an affidavit of the applicant, that she, ***Mrs. Mary W. Stevens,*** had at a certain time "said that the new Board would not obey orders of the Court." The deponent avers that she was not personally served with the order in question, but only became aware of it through the then acting Director. She says that pending the resolution of this matter, the defendant has stayed the recruitment of a new director, pursuant to the Court order.

The applicant found it necessary to swear a further affidavit dated and filed on 20th September, 2004 in the light of the depositions by ***Mrs. Deborah A. Nyabundi*** and ***Mrs. Mary W. Stevens***. He avers that he had, on 15th July, 2004 when he reported to the defendant's premises, "met the Acting Director ***S. Maitha***, with whom I held a [lengthy] meeting in my office as I discharged my duties." He averred that he is at all material times an employee of the defendant with *a clear contract on terms of termination.* He depones that the senior Government officials have no power over him as an employee and he is already challenging them in ***Miscellaneous Civil Application No. 612 of 2004***. The applicant avers that "the defendant has never been directed to transfer me either by the Minister or by any other person." He depones that the said transfer *has never taken place "as I never reported* to the purported posting by [the]

said Permanent Secretary.

The application was heard before me on 13th October and 9th November, 2004 when learned counsel, ***Mr. Nyandieka*** appeared for the applicant, and learned counsel, ***Mr. Koech*** appeared for the respondent.

2. Submissions for the Applicant

Mr. Nyandieka presented the Notice of Motion of 6th August, 2004 as carrying two prayers*: to cite and punish the defendant/respondent and its officers, for contempt of Court orders*, and to *win costs for the applicant.* Counsel stated that the relevant Orders had been made on 14th July, 2004 following which they were extracted and served, being imprinted with a *penal notice*. He contended that evidence set out in the applicant's affidavits showed contempt of the Court's Orders by the respondent. The contempt, counsel submitted, took the form of *the applicant being physically stopped from entering the defendant's premises for the purpose of discharging his duties; changing the locks to the office he had been occupying; stopping payment of his salary.* Counsel submitted that the part of the order disobeyed by the respondent was the one "*dealing with interference with the applicant's employment."*

In support of his submissions, counsel cited the Court of Appeal case, ***Refrigerator & Kitchen Utensils Ltd v. Gulabchand Popatlal Shah & Others,*** Civil Application No. Nai 39 of 1990. The main passage the applicant relied on, in that decision, was the following:

"It is essential for the maintenance of the rule of law and good order that the authority and dignity of our Courts are upheld at all times. This Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors."

The foregoing passage, however, is no more than a *general statement of principle* which expresses the spirit behind the law of contempt. Therefore, so baldly stated, it would not help the applicant to prove his gravamen; he must in the first instance show *that there indeed was an act committed by the defendant in contempt of Court*.

I will note, however, that the ***Refrigerator & Kitchen Utensils*** case is an important local decision on contempt of Court insofar as it states *other principles* which must guide this Court in deciding a matter such as the instant one. This case, for instance, underlines the requirement *of service upon the respondent* of the relevant Court order. It also states another condition of operation of the Court's contempt jurisdiction:

"….in cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but proved to a standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt."

Yet another principle stated in the case is that *the terms of the order in question must be crystal-clear and must not admit of ambiguities or equivocations* so as to give excuses or pretexts for a party to elect which course of conduct to pursue. These tests are going to provide the legal framework within which the acts complained of are to be assessed, in the instant matter.

3. Submissions for the Respondent

Learned counsel, ***Mr. Koech*** submitted that the main application carrying the seed of the gravamen in the Notice of Motion of, 6th August, 2004 was the *applicant's Chamber Summons of 5th July, 2004.* It was contended that the material prayer in that application, which led to the Court Order which is the basis of the instant application, was an essentially *vague one*, namely prayer number 2 which was couched as follows:

"THAT a temporary injunction do issue restraining the defendant by itself, its officers and/or agents or otherwise howsoever from transferring, retiring, terminating and/or dismissing the

applicant's employment or interfering with the employment of the applicant *Stanley Kamanga Ng'ang'a* pending the *inter partes* hearing of this application and pending hearing and final determination of this suit."

Vagueness in this prayer which was granted in those very terms by Court on 14th July, 2004 is attributed to the fact that *at the time of filing the application, the applicant had already been transferred* to the Ministry of Trade, by the Permanent Secretary's circular letter dated 27th January, 2004 - six months earlier. Therefore, counsel contends, it was no longer possible for the respondent to again retire or dismiss the applicant - and this was the ***status quo*** by the time the applicant moved the Court. Counsel posed the question: *Was the Court's order of 14th July, 2004 to the effect that the applicant be reinstated in his employment*? Counsel noted that by the time the Court's order was made on 14th July, 2004 the letter transferring the plaintiff to the Ministry of Trade, of 27th January, 2004 had *not been cancelled*; and this letter thus remains *a standing directive of the Permanent Secretary* in the Office of the President and Head of the Public Service. ***Mr. Koech*** remarked that the applicant had not indicated in his *depositions if at the time he moved the Court, he was carrying any duties as Director.*

It may be for the purpose of meeting this objection that the applicant found it necessary to swear a further affidavit in which he says he, on 15th July, 2004 *"met the Acting Director…with whom I held a [lengthy] meeting in my office as I discharged my duties*." The claim, however, raises more questions than it answers, as it does not say how an acting Director was in office, and yet in that very office the applicant was "discharging his duties". I think the more plausible factual position is that *the person formally in office was the acting Director*, rather than the applicant.

Learned counsel submitted that the design of the Court's order of 14th July, 2004 was not to *disturb* the ***status quo*** obtaining at the Kenya National Library Services, but rather, to *maintain* the same. In that ***status quo***, the applicant *had been transferred*, and he had accepted the transfer by agreeing to go on leave on the basis that he would thereafter report to his new place of posting. The Permanent Secretary's letter to the applicant of 5th February, 2004 reads:

"You should therefore make arrangements to report to your new station on 23rd February, 2004 for deployment."

And when, on 20th February, 2004 the applicant applied for annual leave, the same Permanent Secretary wrote to him as follows:

"I acknowledge receipt of your letter…dated 20th February, 2004 requesting for approval to proceed on your annual leave.

"I note that the days were accumulated during your service to the Kenya National Library Service Board.

"Your request has been granted and you may proceed on leave prior to reporting to your new station."

Learned counsel submitted that it emerged from such correspondence that the applicant *had accepted his transfer*, and gone further to "implement" the same.

Mr. Koech submitted that the defendant had in every respect given obedience to the Court orders - on the basis of *maintenance* of the ***status quo.*** When the applicant, on 15th July, 2004 went to sit in the office, counsel submitted, he was applying his own subjective interpretation of the Court's Order, which was not at all related to the maintenance of the ***status quo;*** and such an interpretation, ***Mr. Koech*** submitted, was itself no less than an abuse of the orders of the Court. The ***status quo***, counsel submitted, was quite clear to all the parties: *the applicant was on leave, and was to relocate to a new station of posting.*

Counsel submitted that it was of no materiality in the instant matter, that the applicant had filed *a judicial review motion challenging his transfer to another station of work*; for that application was yet to be heard and it had no effect on the present application.

Learned counsel sought to rely on the Court of Appeal decision in ***Mutitika v Baharini Farm Ltd*** [1985] KLR 227, on the standard of proof that the applicant was required to achieve in a contempt application. It is stated in that case that: "The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost, but not exactly, beyond reasonable doubt as it is not safe to extend the latter standard to an offence which is quasi-criminal in nature" (pp.227 – 28). In addition, "The Courts…take the view that where the liberty of the subject is, or might be, involved, the breach for which the alleged contemnor is cited must be *precisely defined*…" (p.233).

On the basis of the above authority, learned counsel submitted that the jurisdiction to commit for contempt should be carefully exercised; and he urged that contempt orders were inappropriate in the present matter. The orders alleged to have been disobeyed, ***Mr. Koech*** submitted, had been made *by consent*, and before the defendant had filed a reply to the application; they were issued for no other purpose than to maintain the ***status quo***, so that the substratum of the application is not adversely affected. Indeed this interpretation would appear to emerge from the hand-written orders of ***Mr. Justice Lenaola,*** made on 14th July, 2004:

"Pending hearing *inter partes* and so as not to prejudice any party's interests in the suit, interim orders in terms of prayer 2 are granted."

The more specific purpose of these orders, counsel submitted, was *"to restrain the replacement of the Chief Executive Officer."*

Counsel submitted that the background to the orders of 14th July, 2004 would commend to the Court that, rather than cite and punish the alleged contemnors, the principles in the ***Mutitika*** case be adopted, and the parties given a chance to proceed with the main application on its merits. It is from such a full hearing, counsel urged, that clearer orders can be made.

Counsel submitted that the respective positions of the parties shows clearly that there *are differing interpretations of the Court orders*. In ***Jacob Zedekiah Ochino & Another v. George Aura Okombo & 4 Others,*** Civil Appeal No. 36 of 1989 the Court of Appeal underlined the importance of *clarity in orders* before they can be held to give justification for the exercise of the contempt jurisdiction: *"[The] Court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of injunction has been proved…"*

Learned counsel submitted that the application which gave rise to the orders was for *prohibitory* and not *mandatory* orders. The relevant Government directives had been issued much earlier; and the same were already in place when service of the Orders was effected. The evidence shows, counsel urged, that the respondents did duly comply with the orders, *by not appointing a Director*. Accordingly, counsel urged, the defendant had not *"interfered with the employment of the applicant."*

Mr. Koech submitted that the mode of compliance adopted by the defendant could not be impugned, because *the Court had not specified the manner of compliance.* And on this point an earlier decision of this Court was relied on, in ***James Kipkonga Kendagor v. John Kibosia & Another***, Miscellaneous Application No. 10 of 2004. The following passage in that ruling is relevant:

"It is the claim by the applicant that the valid Court Orders made by the Honourable Mr. Justice Lenaola on 18th February, 2004 entitled him not only to be re-admitted to College but also to proceed with his studies in College and with scheduled examinations entirely in accordance with the regular programmes in place. I must say I have received no evidence that the Court, in making its Orders, had gone that far. I must take it that the Court's Order was only intended to restore the applicant to the College, but that the Court in no way imposed an obligation on the College to

shorten the applicant's programme, or to accord him any dispensations in the administration of the teaching and examination programmes."

Relying on the principle in the ***Kendagor*** case, counsel submitted that the orders in the instant matter had placed an obligation on the respondent's *"not to interfere with the applicant's employment, but did not say he should resume his employment immediately*."

Learned counsel also noted from the depositions of ***Deborah Nyabundi*** and ***Mary Stevens*** that, it had not been shown that personal service was effected upon them. In the Court of Appeal decision in ***Loise Margaret Waweru v. Stephen Njuguna Githuri,*** Civil Appeal No. 198 of 1998 the following statement of the law appears:

"In this case it is clear from the evidence that there was no personal service on the appellant, and in the absence of this she could not be committed for contempt of Court. Secondly, the appellant did not disobey the order in its entirety."

Both deponents have spoken of "becoming aware" of the Court orders; but it has not been positively stated that they were *personally* served. The affidavit of service showed service only upon ***S. Maitha***, who is no longer an officer of the respondent.

4. Further Submissions for the Applicant

Learned counsel, ***Mr. Nyandieka*** doubted whether it was in order for counsel for the defendant to make interpretations of the orders of 14th July, 2004 as they were, in his view, crystal-clear. He also contended that the said orders had nothing to do with maintenance of the ***status quo.*** On service, counsel stated: "*service of the order is not disputed; they have admitted they are aware of the orders, and of the affidavit of service."* Counsel submitted that the officers of the defendant did have notice of the Court orders, but took their own decisions, and consequently were guilty of disobedience.

Counsel discounted the relevance of the communications that had taken place between the applicant and senior officers of the Government, because:

"The applicant is not a civil servant. He went through a competitive interview, with clear terms governing his contract of employment."

Counsel submitted that the applicant's category of employment was ***"quasi*** *public service,"* and that he had only one employer, namely the Kenya National Library Services.

5. Final Analysis and Orders

I have earlier set out the original version of the order which is the basis of the instant contempt application. It is not possible to doubt the statement of counsel for the respondent, as it has not been contradicted by any evidence, that the Order of 14th July, 2004 was a *consent order made to preserve the conditions preparatory to full hearing*. Such an order is clearly a preservatory one which seeks to maintain a ***status quo*** in the interim period.

For an order so consensual and so broad, a charge of contempt will inevitably be difficult to prove. This is because the order carries different nuances, and may well be the subject of different interpretations, unless it has been defined and expressed in quite specific terms. It is rightly stated by the respondent that it has *not hired a new Director*, the position the applicant claims, and the respondent is waiting on further judicial processes to solve the question as to the Director's position. At the very least, this is a *partial compliance* with the Court's orders of 14th July, 2004.

Did those orders place any mandatory obligations upon the respondent? The applicant appears to think so; the respondent does not. I think the respondent is right. For there are *unsolved legal questions that must first be determined*. For instance, is the applicant required under the law to transfer his services to a

different public or quasi-public body? While learned counsel for the applicant would answer that question in the negative, it remains the case, whether he is right or wrong, *that the defendant cannot presume to have the answer*; and the matter must *await resolution through the judicial process*. Which means the applicant *has no right in law* to start implementing his own perception of "*right";* nor does a mandatory obligation rest on the defendant to allow him to do so. The defendant's legal obligation in the interim period cannot be but to *protect the* ***status quo***, *prudently manage its resources, and use its existing capacity to manage its affairs in the best way possible.*

While taking it in favour of the applicant that the defendant is fully aware of the Court orders of 14th July, 2004 and so the *service* problem can perhaps be overlooked, I am convinced that *the consensual spirit of those orders,* and *their rather general texture*, would render it difficult to prove that the respondent has been in breach. The high standard of proof required for alleged disobedience to Court orders, as set out in ***Mutitika v. Baharini Farm Ltd*** [1985] KLR 227, has in my view not been attained by the applicant. The loose texture of the said orders has not very well permitted the applicant to show a lack of ambiguity such as is required, if disobedience is to be proved.

I am convinced that this is not a case in which the respondents can be cited and punished for contempt of Court as proposed by the applicant. Accordingly, I hereby dismiss with costs the applicant's application by Notice of Motion dated 6th August, 2004.

Orders accordingly.

DATED and DELIVERED at Nairobi this 11th day of February, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Nyandieka, instructed by M/s. Nyandieka & Associates Advocates

For the Defendant/Respondent: Mr. Koech, instructed by M/s. Kipkenda, Lilan & Co. Advocates.