



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

JUDICIAL REVIEW CAUSE NO. 1 OF 2018.

PATRICK WANYONYI MUNIALO.....APPLICANT

AND.

COUNTY EXECUTIVE COMMITTEE (CEC) MEMBER

FOR WATER & NATURAL RESOURCES

BUNGOMA COUNTY.....1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE (CEC) MEMBER

FOR WATER & NATURAL RESOURCES

TRANS-NZOIA COUNTY.....2ND RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA.....3RD RESPONDENT

COUNTY GOVERNMENT TRANS-NZOIA.....4TH RESPONDENT

AND.

NZOIA WATER SERVICES CO. LTD.....INTERESTED PARTY

AND.

KENNEDY KILALI WEKESA.....1ST RESPONDENT/CONTEMNOR

LUSWETI FURAHA B.K.S.....2ND RESPONDENT/CONTEMNOR

DICKSON K. KIRUL.....3RD RESPONDENT/CONTEMNOR

RULING.

The applicant Patrick Wanyonyi Munialo filed an application for Judicial Review dated 25th January, 2018 under Certificate of urgency seeking the following orders;

(1) That the Applicant be granted leave to apply for an order of certiorari to remove into the High Court and quash the decision of the 3rd & 4th Respondent issued through the 1st & 2nd Respondents via their letter dated 8th January 2018 suspending the Applicant as Managing Director of the Interested Party for no justifiable cause, without the legal authority or mandate to act as such and without giving the Applicant the right to be heard.

(2) That the Applicant granted leave to apply for an order of prohibition restraining the Respondents either by themselves or by someone authorized by them from suspending, taking disciplinary action or otherwise terminating the Applicant's contract without strict compliance with the Memorandum and Articles of Association of the Interested Party, applicable law and the Constitution of Kenya.

(3) That the Grant of Leave do operate as stay of implementation of the impugned decision and all subsequent steps arising therefrom and in particular the Applicant to remain in his position pending the hearing and determination of the substantive motion.

(4) That the costs of this application be in the cause.

The application was accompanied by statutory statement and verifying affidavit sworn on 28th January 2018. By order dated 25.1.2018 Aroni J. ordered;

1) That this application be and is hereby certified urgency and be heard ex-parte in the first instance.

2) That the Applicant be and is hereby granted leave to apply for an order of certiorari to remove into the High Court and quash the decision of the 3rd and 4th Respondents issued through the 1st and 2nd Respondents via their letter dated 8th January 2018 suspending the Applicant as Managing Director of the Interested party for the justifiable cause, without the legal authority or mandate to act as such and without giving the Applicant the right to be heard.

3) That the Applicant be and is hereby granted leave to apply for an order of prohibition restraining the Respondents either by themselves or by someone authorized by them from suspending, taking disciplinary action or otherwise terminating the Applicant's contract without strict compliance with the Memorandum and Articles of Association of the Interested Party, the applicable law and the Constitution of Kenya.

4) That the Grant of Leave do operate as stay of implementation of the impugned decision and all subsequent steps arising therefrom and in particular the Applicant to remain in his position pending the hearing and determination of the substantive motion.

5) Costs to abide the income of the suit.

6) The main application be filed within seven days.

The said order having been disobeyed by the Respondents Contemnors, the applicant filed this application dated 1.3.2018 seeking the following orders;

(a) **THAT** the honourable Court be pleased to cite MR. KENNEDY KILALI WEKESA, LUSWETI FURAH B.K.S. and MR. DICKSON K. KIRUI, acting for the Interested Party for being in contempt of a valid order of this honourable court, issued in this matter on 25th January, 2018 and served on the Interested Party on 26/1/2018.

(b) **THAT** this honourable court be pleased to order that MR. KENNEDY KILALI WEKESA, LUSWETI FURAH B.K.S. and MR. DICKSON K. KIRUI, acting for the Interested Party be punished for contempt of Court by imprisonment for a term that this Honourable Court shall deem fit or pay a fine or both for disobedience of the order of this court made on 25th January, 2018.

The application is supported by the affidavit of the applicant where he deponed;

1. **THAT** this court made specific orders on 25/1/2018 staying the Respondents' decision of suspending me from my position as the Managing Director of the Interested Party and directing that I continue serving as such pending the hearing and determination of the substantive application for Judicial Review.

2. **THAT** the Respondents were duly served with the said court order on the 26/01/2018.

3. **THAT** by virtue of the said order, the court directed that I remain in my position as the Managing Director of the Interested Party pending the hearing and determination of the substantive application for Judicial Review.

4. **THAT** MR. KENNEDY KILALI WEKESA has now installed himself as an acting Managing Director.

5. **THAT** MR. LUSWETI FURAH B.K.S. has installed himself as the Chairman of the Board of Directors of the Interested Party.

6. **THAT** on 29/1/2018, I reported on duty at the Interested Party's offices at Webuye only to find goons hired by the said KENNEDY KILALI WEKESA who prevented me from accessing the office and informed me that they had instructions from the said KENNEDY KILALI WEKESA to ensure that I do not access my office or even the compound.

7. **THAT** MR. KENNEDY KILALI WEKESA barred me from accessing my office so that to continue serving to my position as directed by the court.

8. **THAT** on 1/2/2018 at 9 a.m. MR. LUSWETI FURAH B.K.S. served my Advocate with a suspension letter suspending me indefinitely and barring me from accessing my office.

9. **THAT** the purported meeting which resolved my suspension was allegedly held on 1/2/2018, and the said meeting was convened by

MR. DICKSON K. KIRUI though he is a stranger to the Interested

Party having ceased to work for the Interested Party on 18/9/2017.

The Respondents filed Replying Affidavit to oppose the application.

The 1st Respondent/Contemnor Kennedy Kilali Wekesa in his Replying Affidavit deponed that there is no evidence that he was appointed the acting Managing Director and it is the head of the Technical Services who was appointed; that the applicant never attempted to go back to the office and was prevented by goons or by the 1st Respondent, That he did not allocate vehicle to applicant who ought to have looked for alternative transport, and finally that the applicant has not proved that the 1st Respondent contemnor was in contempt of the court order.

The 2nd Respondent/Contemnor Lusweti Furaha B.K.S. deponed that in his individual capacity, that he was served with the order that the 1st Respondents did make available the office of Managing Director to Applicant; that they appointed Mr. Kennedy Kilali as the acting Managing Director and that he was appointed Director and that he was appointed to act as the Chairman of the Board and that the Board of directors have the ultimate powers and mandate to appoint, dismiss and/or extend contracts and/or services. He denied that they hired goods to prevent the applicant to access the premises.

The 3rd Respondent/Contemnor Dickson Kirui in his Replying Affidavit deponed that he was duly retained to provide Secretarial Services to the Board and Company Secretary. In that capacity he is not involved in the running of activities or operations of the 1st Interested Party and his inclusion in these contempt proceedings is misconceived and was not party to the initial proceedings. Further he depones that;

(1) THAT pursuant to the Court Orders issued on 25/01/2018 and in the spirit, desire and while acting in utmost good faith in compliance with the said court order, in my capacity as the Company Secretary, I invited the applicant herein via letter dated 31/1/2018 to attend the Interested Party's Board of Directors Meetings dated 31/01/2018 as its Managing Director and the applicant never attended the said meeting, nor even send an apology.

By Consent of Counsels for the parties the application was to be disposed of by way of written submissions. All the parties filed respective written submissions.

M/s Mumalasi for the applicant submitted that there was a valid court order dated 25.1.2018 which had on it a requisite Penal Notice. The order and Penal Notice was served on the Contemnors on 26.1.2018. In defiance of the court order the Contemnors locked the gate to the premises and placed goons on the gate to prevent the applicant to access the office. Secondly that despite of the order of the court, they replaced the applicant as the Managing Director of the 1st Interested Party. Counsel submitted that contempt of court is a serious matter and the applicant has only to show that there was an order, same was duly served and it was disobeyed by the Contemnors, counsel referred this court to the decision in **Cecil Miller -Vs- Jackson Njeru & Another [2017] eKLR** where the court identified the 4 elements of contempt as;

- (a) That there was a valid Court order and the terms of the order were clear and unambiguous and were binding on the defendant.*
- (b) The defendant had knowledge of or proper notice of the terms of the order.*
- (c) The defendant has acted in breach of the terms of the order, and*
- (d) The defendant's conduct was deliberate.*

Counsel finally submitted that the applicant has demonstrated all the four elements and therefore this court must uphold the authority and dignity of the court by pushing the contemnors.

M/s Seneti & Oburu Advocates for the Respondent submitted that the issues for determination in the application is whether the Contemnors should be cited for contempt, whether the Contemnors illegally hold their respective post and finally whether the applicant deserves the orders sought. Counsel submitted that contempt of court is of a quasi - Criminal in nature which requires proof beyond reasonable doubt. In an application as this the applicant must proof that the Respondents/Contemnors have willfully disrespected and/or disobeyed the court order. He submits that the Respondents/Contemnors have demonstrated that they acted within their powers towards implementing the court order, by arranging for the office of Managing Director, Investigating the issue of goons blocking him. That the non - provision of official vehicle to applicant was due to break – down of vehicles, and that the Respondents/Contemnors were not party to the Judicial Review proceedings.

Counsel for the Respondents/Contemnors further submits that the election on the Board Chairman and appointment of 1st Respondent as acting Managing Director was in good faith and in accordance with the mandate of the Board of Directors and the suspension of the applicant from work is a right of the employer where the employer believes that the employee has been involved in misconduct, poor performance or incapacity. He relied on the decision in **Mary Chemweno Kiptui -Vs- Kenya Pipeline Co. Ltd [2014] eKLR**.

Finally Counsel for the Respondents/Contemnors submits that the applicant has not proved his case beyond reasonable doubt. In particular Counsel submissions, the applicant has not shown that he attempted to gain access to the interested party's premises, I identify the goons who obstructed him, or that the Respondents did not obey the terms of the order.

This application was filed on 1st March 2018 and is premised on the provisions of the contempt of court Act, Act No. 40/2016. It is common ground that In **The Kenya Human Rights Commission -Vs- Attorney General & Another [2018] eKLR**, **Mwita J** declared the act invalid due to lack of participation as required by Article 10 and 11 (b) of the Constitution. Having been declared illegal, it therefore means that

Section 5 of the Judicature Act Cap 8 which had been deleted by Section 38 of the contempt of Court Act was reinstated and became operational. It therefore appears to me that courts in matters of contempt will revert to the position before the enactment of the contempt of Court Act. Section 5 of the Judicature Act provides;

(1) 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.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

Therefore the law which will govern contempt of Court will be the English applicable in England at time the contempt was committed. In my view therefore the law applicable in this application is as provided for by Section 5 of the Judicature Act which had been reinstated by the invalidation of the contempt of courts Act, Act No. 40 of 2016.

The rationale for contempt of court proceedings is grounded on the need to protect the authority and dignity of our courts which is essential for the maintenance of rule of law and order in society. Its objective is to uphold the dignity and authority of the court, ensure compliance with orders of the court; ensure compliance with orders of the court; ensure observation and respect the due process of law and multiply public confidence in the administration of Justice.

The editors of *Borrie and Lowe's Law of Contempt 2nd ed. 1983* observe that:

“The rules embodied in the law of contempt of court are intended to uphold the effective administration of justice. As Lord Simon said in A-G v Times Newspapers Ltd they are the means by which the law vindicates the public interest in the due administration of justice. The law does not exist, as the phrase ‘contempt of court’ might misleadingly suggest, to protect the personal dignity of the judiciary nor does it exist to protect the private rights of the parties or litigants...Contempt of court plays a key role in protecting the administration of justice. It is an impotent adjunct to the criminal process and provides the final sanction in the civil process.”

In order for the court to cite for contempt, the court must be satisfied that there was an order, that the same order was specific requiring the Contemnor to do an act or refrain from doing an act and finally that the Contemnor disobeyed the order. In this application it has been demonstrated by the applicant that there was an order by Aroni J dated 25.1.2018 directing;

1) That the Applicant be and is hereby granted leave to apply for an order of certiorari to remove into the High Court and quash the decision of the 3rd and 4th Respondents issued through the 1st and 2nd Respondents via their letter dated 8th January 2018 suspending the Applicant as Managing Director of the Interested party for the justifiable cause, without the legal authority or mandate to act as such and without giving the Applicant the right to be heard.

2) That the Applicant be and is hereby granted leave to apply for an order of prohibition restraining the Respondents either by themselves or by someone authorized by them from suspending, taking disciplinary action or otherwise terminating the Applicant's contract without strict compliance with the Memorandum and Articles of Association of the Interested Party, the applicable law and the Constitution of Kenya.

3) That the Grant of Leave do operate as stay of implementation of the impugned decision and all subsequent steps arising therefrom and in particular the Applicant to remain in his position pending the hearing and determination of the substantive motion.

4) Costs to abide the income of the suit.

5) The main application be filed within seven days.

The appellant submitted that the order was served by one Charles Sifuna Otunga a licensed Process Server who in his affidavit of service deponed that on 26.1.2018 he served the order on Ken Kilali the 1st Respondent/Contemnor and Lusweti Furaha the 2nd Respondent/Contemnor, who directed their Secretary M/s Dorcas to sign and rubber stamp the return copy. The 3rd Respondent in Paragraph 15 of his Replying Affidavit deponed that he was aware of the Court order dated 25.1.2018.

The applicant submits that despite being served with the order, the Contemnors had a sitting on 1.2.2018 chaired by Lusweti Furaha and purported to suspend the applicant by stating in the letter dated 1.2.2018;

Consequently, you are hereby suspended from exercising your designated duties with immediate effect. While on suspension, you are required within 21 days from the date of this letter to show cause in writing why you should not be summarily dismissed from the service of the company. During this period of suspension you will receive a half basic salary, full house allowance and you will still be covered under the staff medical cover.

During the period of suspension, until your case is concluded, you will not have access to your office.

Through the Respondents/Contemnors in the Replying Affidavit deny disobeying the order, and in particular not being responsible for the goons who allegedly prevented the applicant from accessing the 1st defendant's premises this contention is betrayed by the Respondents' actions as per letter dated 1.2.2018 in which they convened a meeting and purported to suspend the applicant. This letter even on its own

confirm the applications contention that the contemnors disobeyed the specific court which directed that;

1) *That the Applicant be and is hereby granted leave to apply for an order of certiorari to remove into the High Court and quash the decision of the 3rd and 4th Respondents issued through the 1st and 2nd Respondents via their letter dated 8th January 2018 suspending the Applicant as Managing Director of the Interested party for the justifiable cause, without the legal authority or mandate to act as such and without giving the Applicant the right to be heard.*

2) *That the Applicant be and is hereby granted leave to apply for an order of prohibition restraining the Respondents either by themselves or by someone authorized by them from suspending, taking disciplinary action or otherwise terminating the Applicant's contract without strict compliance with the Memorandum and Articles of Association of the Interested Party, the applicable law and the Constitution of Kenya.*

3) *That the Grant of Leave do operate as stay of implementation of the impugned decision and all subsequent steps arising therefrom and in particular the Applicant to remain in his position pending the hearing and determination of the substantive motion.*

That purported suspension of the applicant as per letter dated 1.2.2018 was done in complete disregard and disobedience to the court order. Such action in my view is null and void and of no legal effect in; **Petition No. 3 of 2014 Hon. Martin Nyaga Wambora & 4 Others Vs. Speaker of the Senate & 5 Others in which it was held;**

“We are in agreement with the about authorities, to the effect that anything done in disobedience of court orders is null and void ab initio and is a nullity in law....We must state this point that disobedience of court order is a grave issue as it undermines the rule of law. Article 10 of the Constitution identified the rule of law as one of the national values and principles of governance. Article 3 of the Constitution is very clear that every person has an obligation to respect and defend the Constitution. So that any person who disobeys a court order also violates the Constitution.”

Such acts of disobedience beside being null and void, also attract Penal consequences on the people who disobeyed them. In ***Shimmers Plaza Limited Vs. National Bank of Kenya Limited [2015] eKLR: It was held***

“Unfortunately what we have now is persons both ordinary mortals and person in authority treating Court orders with unbridled contempt with blatant impunity. Was the respondent one such person? Unfortunately the answer to this question is in the affirmative. The order was made in presence of counsel for the respondent who is stated earlier must be presumed to have informed the respondent of the same. He went ahead and transferred the property before the due date of the judgment seemingly impatient to have this matter concluded once and for all. He acted in clear contempt of this Court. Government institutions, State officers, banks, and all and sundry are enjoined by law to comply with Court orders. We must deprecate in the strongest terms possible the worrying trend in this country where court orders are treated with tremendous contempt by persons and institutions which think wrongly of course, that they are above the law. We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:-

“No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour.”

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be pushed, lest they lead us to a state of anarchy. We think we have said enough to send this important message across.”

In this application I am satisfied that there existed a clear and unambiguous court order, the same was served on the Contemnors or had knowledge of it, the Contemnors in blatant disregarded disobeyed the court order and therefore find all the ingredients of the contempt of court established. This court finds that the Contemnors in contempt and in order to uphold the dignity and authority of the court direct that Kennedy Kilali Wekesa, (1st Respondent/Contemnor) Lusweti Furaha (2nd Respondent/Contemnor) and Dickson K. Kirui (3rd Contemnor) do appear before me on 26.2.2019 for Mitigation and Sentence.

Dated and Signed at Bungoma this 12th day of February, 2019.

S.N. RIECHI

JUDGE.