REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 192 OF 2014

IN THE MATTER OF ARTICLES 22, 23 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ETHICS AND ANTI-CORRUPTION ACT, 2011 SECTION 12 (C)

AND

IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA SECTIONS 8 AND 9

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC…………………………………………………….APPLICANT

AND

THE ETHICS AND ANTI-CORRUPTION

COMMISSION……………………………..……………….1ST RESPONDENT

THE ATTORNEY GENERAL…………….………......…....2ND RESPONDENT

KENYA INDUSTRIAL RESEARCH AND

DEVELOPMENT INSTITUTE…….……………........…...3RD RESPONDENT

***EX PARTE*: ERASTUS GATEBE**

RULING

Introduction

1. On 28th November, 2014, this Court granted the following orders:

1) An order of Certiorari removing into this Court for purposes of quashing the findings and decision of the 1st Respondent contained in the 1st Respondent's letter of 11th March 2014 addressed to the 3rd Respondent which findings are hereby quashed.

2) An order of Prohibition directed at the 3rd Respondent prohibiting the 3rd Respondent from proceeding with disciplinary action against the *Ex parte* Applicant on account of the findings and decision of the 1st Respondent communicated to the 3rd Respondent in the letter dated 11th March 2014.

3) Costs of this application are awarded to the applicant to be borne by the 1st Respondent.

2. The applicant herein has now moved this Court by a Chamber Summons dated 2nd September, 2016, substantially seeking an order that this Court does find **Eng. J K Kamau**, Acting Director of the Kenya Research and Development Institute, in contempt and that the said person be arrested and committed to prison for a term not exceeding six (6) months. It was further sought that the Court orders the 3rd Respondent herein to retract the show cause letter dated 26th July, 2016 addressed to the applicant asking him to show cause why disciplinary action should not be taken against him and that the 3rd Respondent be ordered to refrain from making such actions.

3. What provoked these proceedings was a memo dated 14th April 2014 by which the 3rd Respondent required the applicant to show cause why disciplinary action should not be taken against him on an allegation of having earned double salary in contravention of the ***Public Officer Ethics Act*** and the ***Leadership and Integrity Act*** which allegation was said to have emanated from communication received by the 3rd Respondent from the 1st Respondent. That communication was alleged to have been the culmination of investigations undertaken by the 1st Respondent which had revealed that the applicant had earned a double salary from Jomo Kenyatta University of Agriculture and Technology (JKUAT) and KIRDI for a period of four months.

4. According to the applicant, he was not privy to any investigations against him by the 1st Respondent and he only learnt of the said investigations on 12th May 2014 when he was furnished with a copy of the 1st Respondent's letter of 11th March, 2014 by the 3rd Respondent. To him, the investigations alluded to in the 1st Respondent's letter of 11th March 2014 were conducted without his involvement yet he was the subject of the investigation in breach of the rules of natural justice on the right to be heard and also in breach of Article 47 of the Constitution which guaranteed him the right to administrative action that is procedurally fair.

5. After hearing the application this Court found that the 1st Respondent in conducting investigations ought to comply with the basic requirements of the rules of natural justice and found that the 1st Respondent's decision to recommend that disciplinary action be commenced against the applicant was tainted with procedural impropriety for failure to afford the applicant fair administrative process hence its action was null and void *ab initio* and hence could not stand.

6. In the present application, the applicant contends that though the said decision prohibited the 3rd Respondent from proceeding with the disciplinary proceedings against the applicant with respect to his former employment status with JKUAT, the 3rd Respondent has gone ahead vide its letter dated 26th July, 2016 to ask the applicant to show cause why disciplinary action cannot be taken against him based on facts which are substantially the same and similar to those which led to the earlier decision. According to the applicant the said action amount to contempt of Court.

7. These facts were reiterated by **Mr Koceyo**, learned counsel for the applicant who submitted that since the intended disciplinary action is based on the same grounds as the earlier quashed proceedings, by asking the applicant to show cause the 3rd Respondent is in fact attempting to achieve what it failed to achieve earlier on through the backdoor.

8. On the part of the respondent it was contended through learned counsel, **Mrs Guserwa** that the earlier judgement was based on the fact that the Ethics and Anti-Corruption Commission (EACC) arrived at a decision without affording the applicant an opportunity of being heard. In this case however, subsequent to the said judgement, the 3rd Respondent, on own motion commenced investigations with respect to the allegations made against the applicant and pursuant thereto asked the applicant to respond to the findings but the applicant declined to do so. The applicant was further invited to a meeting on the same issue but instead of attending the same opted to institute these proceedings.

9. It was the 3rd Respondent's case that the cause of action that led to the earlier judgement was not the same as in the present case. It was therefore contended that there cannot be contempt in the circumstances of this case.

10. I have considered the issues raised herein.

11. Before dealing with the issues raised herein, it is important to revisit the current procedural law relating to contempt of Court in this country. In contempt of Court matters, the first port of call with respect to the procedure for institution contempt of Court proceedings in this country is section 5 of the ***Judicature Act*** Cap 8 Laws of Kenya which section 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.***

12. As this Court has held before, it is unfortunate and regrettable that in this age and era, our procedure, with respect to punishment for contempt in our Court is referable to the procedure in the High Court of Justice in England.

13. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the ***Judicature Act***.

14. The High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. It is true that following the implementation of **Lord Woolf's** "***Access to Justice Report, 1996***", the ***Rules of the Supreme Court*** of England are being replaced with the ***Civil Procedure Rules, 1999*** and pursuant thereto the Court of Appeal in the above decision recognised that on 1st October, 2012 the ***Civil Procedure (Amendment No. 2) Rules***, 2012, came into force and Part 81 thereof effectively replaced Order 52 of the ***Rules of the Supreme Court*** which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as "application notice", the application is made in the proceedings in which the judgement or order was made or undertaking given and the application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. The Court of Appeal held that leave or permission is nolonger required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement.

15. It follows that an application for contempt is by "application notice" and not by chamber summons as the applicant herein did. That however is a procedural irregularity which may not necessarily be fatal to the application though it may be taken into consideration when making orders with respect to costs.

16. For an application of contempt to proceed, however, the cause of action that triggered the decision alleged to have been disobeyed must be the same or substantially the same. If for example what is alleged to have been committed could not possibly have been the subject of the earlier decision, the Court cannot in effect vary the earlier decision in order to bring the new circumstances within the said decision. It is therefore important for the Court to distinguish discovery of new facts and fresh happenings. The former may only escape the dragnet of contempt if the applicant satisfies the Court that he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when the earlier proceedings were heard and determined. However where there are fresh happening those happenings unless it is shown that they were deliberately created by the respondent in order to avoid the wrath of the Court cannot certainly be the subject of contempt proceedings.

17. Judicial review proceedings generally do not deal with the merits of the case and where a decision has been quashed on the grounds of procedural impropriety, nothing bars the respondent from properly commencing similar proceedings even if based on the same facts unless in the earlier proceedings the Court expressly barred the respondent from proceeding further. In other words an order of certiorari does not necessarily compel the respondent to act in a particular manner as long as the respondent in the subsequent proceedings does not repeat the same mistakes that led to the quashing of the earlier decision. This was the position adopted by the Court of Appeal in In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** the Court of Appeal expressed itself as follows:

> **"It is doubtful whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law…"**

18. In the earlier decision this Court was clear in its mind that what it quashed were the findings and decision of the 1st Respondent contained in the 1st Respondent's letter of 11th March 2014 addressed to the 3rd Respondent. It further prohibited the 3rd Respondent from proceeding with disciplinary action against the *Ex parte* Applicant on account of the said findings and decision. In other words the 3rd Respondent was not prohibited from commencing disciplinary proceedings on its own motion. It follows that if as the 3rd Respondent contends, the fresh disciplinary proceedings are as a result of its own investigations, the 3rd respondent cannot be in contempt as this Court did not prohibit it from doing so.

19. As rightly submitted by **Mrs Guserwa** if in that process grounds for judicial review relief arise, they can only be the basis of fresh proceedings.

20. It must always be remembered that burden of proof in contempt of court is higher than balance of convenience required in civil proceedings but lower than the standard in criminal proceedings which is beyond reasonable doubt. Without evidence that the fresh disciplinary proceedings against the applicant are based on findings and decision of the 1st Respondent contained in the 1st Respondent's letter of 11th March 2014 addressed to the 3rd Respondent, these contempt proceedings cannot succeed.

Order

21. In the result I find no merit in the Chamber Summons dated 2nd September, 2016 which I hereby dismiss with costs to the 3rd Respondent.

22. It is so ordered.

Dated at Nairobi this 1st day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nyagah for Mrs Guserwa for the Respondent

CA Mwangi