IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, WARSAME & GATEMBU, JJ.A)

CIVIL APPEAL NO. 282 OF 2017

BETWEEN

TRIBE HOTEL LTD…….. APPELANT

AND

JOSPHAT COSMAS ONYANGO …..... RESPONDENT

(Being an appeal against Ruling and Orders (Mbaru, J)dated 6th *April, 2017 in* ***Employment & Labour Relations Court Claim No. 417 of 2016****)*

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JUDGMENT OF THE COURT

1. Tribe Hotel Ltd, the appellant, employed Josephat Cosmas Onyango, the respondent, in the position of an assistant Food and Beverage Controller at its hotel situated in Nairobi on terms and conditions set out in a letter of appointment dated 26th February 2010 (the contract) for a contract period of 5 years commencing on 1st April 2010. The contract provided that at the end of the 5 years, and subject to the respondent scoring an average of 70% from the combined previous appraisals, and clearing of benefits accrued by the appellant to the respondent, the *"appointment may be renewed for a new term as well as your package being renegotiated."*

2. All appears to have gone well between the parties within the 5- year contract period. Indeed, on expiry of the 5-year contract period on 31st March 2015, the respondent continued in employment. However, by a letter dated 17th December 2015, the appellant *"renewed"* the respondent's employment contract in the same position of assistant Food and Beverage Controller

> "for a period of 1 year" to *"expire on 31st March 2016."* That letter also stipulated that at the end of the 1-year period, the appointment *"may be renewed for a new term"* subject to the respondent scoring an average of 70% from the combined performance appraisals. The respondent was not impressed and declined the renewed contract.

3. On 26th January 2016, the appellant wrote a letter to the respondent in the following terms:

> **"26th January 2016**
>
> **Mr. Josphat Cosmas Onyango**
>
> **Assistant F & B Controller**
>
> **Staff # TAF 2-0309**
>
> **Tribe Hotel**
>
> **Dear Josphat,**
>
> **RE: End of C*ontract***

I refer to our meeting on 11th *January 2016 which was attended by you and myself and reference to your employment with Tribe Hotel Limited in the capacity of Assistant F & B Controller.*

You were issued with a contract on 1st April 2010, which fell due for review on 31s March 2015; you were offered renewal contract, which you refused to sign. This letter serves you as a reminder that your contract ends on 31st *March 2016.*

Consequently, your last working day will be 31st *March 2016 and your final dues will be computed as follows:-*

1. Salary for the month of March 2016;

2. 88 Days' pay on account of leave accrual;

3. 2 days pay on account of public/off days;

4. Less all loans and advances, if any.

You are expected to have returned all the Company property in your possession, if any, upon which a clearance certificate will be issued to make the above dues payable to you.

Sincerely

Salem T. Mukulu Stephan Meves

Human Resources Manager General Manager"

4. The respondent was aggrieved. He filed suit before the Employment and Labour Relations Court (ELRC). In his statement of claim he sought amongst other reliefs, a permanent injunction to restrain the appellant from terminating his employment; a declaration that the intended termination on 31st March 2016 was unfair and wrongful; salary for the remainder of 18 years he expected to work; 12 months' salary for wrongful termination, and general damages.

5. Alongside the statement of claim, the respondent filed an application dated 16th March 2016 seeking interlocutory relief by way of a restraining order to prevent the appellant from terminating his employment pending the hearing and determination of his statement of claim. In opposition to the application, the applicant filed a replying affidavit sworn by its Human Resources manager.

6. The application was heard before M. Mbaru, J who, in a ruling delivered by on 5th May 2016 ordered that:

"Unless otherwise lawfully terminated, the Claimant shall remain in his employment with the Respondent; the Respondent is hereby restrained from terminating the Claimant's employment pending the hearing of his case; the position of the Claimant secured, the order seeking that his position not be advertised is academic. The respondent has 14 days to file the Statement of Response or Defence to the claim."

7. In its interpretation of that order, the appellant was of the view that nothing in that order prevented it from "otherwise lawfully terminating" the respondent's employment. Accordingly, on 30th June 2016, the appellant gave a redundancy notice to the respondent to the effect that his services would no longer be required with effect from 1st August 2016 on the grounds that the appellant was automating the same by purchasing Beverage Control Software that would more efficiently carry out those tasks. In the same letter, the appellant indicated that it would pay the respondent's final dues made up of one month (July) full pay; two months' pay in lieu of notice; 15 days' pay in lieu of severance pay for each year of service less loan and advance deductions, if any, and less statutory deductions.

8. The respondent was again dissatisfied with the appellant's action. He moved the court by an application dated 14th July 2016 seeking an order to prohibit the appellant from declaring him redundant pending the hearing and determination of the suit. He contended that by issuing the redundancy notice, the appellant was seeking to circumvent the ruling of the court given on 5th May 2016.

9. In opposition to the respondent's application dated 14th July, 2016, the appellant relied on an affidavit sworn by its Human Resource Manager. It asserted that the ruling of 5th May 2016 did not provide that the respondent was to continue in employment indefinitely and that the redundancy was procedural and within due process. Furthermore, the appellant contended, the respondent had since sought employment with a different employer, namely Best Western Hotel.

10. On 20th July 2016, the court (Nzioka wa Makau, J) certified the application dated 14th July 2016 as urgent and issued an order that:

"An interim Preservatory Orders (sic) ***to stay and/or stop the operation and effect of the Respondent's letter dated 30th June, 2016 giving notice to terminate the Claimant's employment with itself on account of redundancy pending interpartes hearing on 3/8/16 before Duty Court."***

11. It is not clear from the record whether an inter partes hearing, in accordance with that order, ever took place. However, the respondent

presented an application dated 22nd February 2017 to the court seeking an order that the directors of the appellant, namely Hamed Ehsani, Shanim Ehsani and Hooman Ehsani, as well as the appellant's Group Human Resource Manager, Elizabeth Chege, be cited for contempt of court for disobeying the orders of 5th May 2016 and 20th July 2016. The respondent averred that the appellant had failed to comply with those orders in that it *"refused to remit the salary for the month of January 2017 together with all accruing benefits that include payment of Kshs. 40,000/- school fees for the children of the"* respondent.

12. The Judge heard the application dated 22nd February 2017 ex-parte and granted orders on 3rd March 2017:

> ***"That Hamed Ehsani, Shanim Ehsani and Hooman Ehsani the Directors of the respondent together with Elizabeth Chege the group Human Resource Manager of the respondent be and are hereby cited for contempt of court for disobeying the order of 5th May, 2016 and 20th July, 2016 for attendance to state why there is no compliance or sanction to issue on 13th March, 2017 failure to which claimant shall prosecute order (3) of the application."***

13. In a replying affidavit sworn on 14th March 2017 in opposition to the application dated 22nd February, 2017 the appellant's Human Resource Manager deposed that the respondent had failed to report back to work after his leave days had ended; and that on making enquiries and carrying out investigations, the appellant established that the respondent was working for Hotel Rio, in Nairobi West.

14. After hearing that application, the Judge delivered the impugned ruling on 6th April 2017 ordering the appellant to "*comply with the orders of the court and to report compliance on 18th April 2016*" and failure to which sanctions and penalties in the form of payment of Kshs. 1 million by each cited officer or a jail term of upto 2 years shall result. Thereafter, the matter was mentioned before the court on several occasions, warrants of arrest for the directors of the appellant issued and subsequently lifted.

The appellant remained aggrieved by the ruling of the court given on 6th April 2017 and lodged the present appeal.

The appeal and submissions

15. In its memorandum of appeal expounded upon by counsel for the applicant in written submissions, the appellant complains that in finding the appellant's Directors and Human Resources Manager in contempt of court for disobeying a court order, the Judge failed to have regard to the fact that the respondent's salary was stopped because he willingly left the applicant's employment and the appellant could not in the circumstances, continue paying the respondent's salary; and that the respondent had obtained employment elsewhere; that there was no evidence to prove that the appellant's Directors and Human Resource Managers were in contempt of court; that the penalty imposed by the Judge was illegal as the penalty prescribed is six months sentence and a maximum fine of Kshs. 200,000.00.

16. During the hearing of the appeal, Mr. B. M. Musyoki, learned counsel, represented the appellant. Though served with notice of hearing, there was no appearance for the respondent. Mr. Musyoki relied entirely on his written submissions in which he submitted that it was incumbent upon the respondent to prove, on a standard higher than that of balance of probabilities, that the appellant's directors and its human resource manager had willingly disobeyed a court order; that while the orders that the appellant is claimed to have disobeyed restrained the appellant from sacking or terminating the respondent's employment, the respondent did not demonstrate that the appellant had either sacked or terminated the respondent.

17. Counsel urged that the appellant presented evidence to show that the respondent had sought and obtained employment elsewhere; that in light of that intervening factor, the court orders could not be enforced. In that regard, counsel referred to the decision of this Court in **Kenya Airways Limited vs. Satwant Singh Flora, Civil Appeal No. 54 of 2005[2013] eKLR**. According to counsel, had the Judge taken these intervening factors into account, she would not have made the orders that she did. Counsel urged that the appellant was not under an obligation to continue paying an employee who had absconded duties and who was earning a salary elsewhere.

18. Furthermore, counsel argued, the orders of the court alleged to have been breached were not clear that the appellant was to keep the respondent in employment under all circumstances; and that the orders did not address the question of when and under what circumstances salaries were to be paid. Referring to the case of **Ochino & another vs. Okombo & others [1989] KLR 165**, counsel submitted that the court should only punish a party for breach of injunction if satisfied that the terms of the injunction are clear and unambiguous; that as the respondent failed to work. Counsel stressed that the appellant was not under a duty to pay a salary that was not earned and that the failure to pay the respondent's salary did not amount to sacking or termination.

19. Counsel concluded by submitting that the penalties imposed by the Judge upon finding the directors and the human resource manager of the appellant guilty of contempt are illegal; that the Judge sentenced them to a fine of Kshs. 1,000,000.00 each or two years in prison each in violation of Section 28 of the Contempt of Court Act which prescribes a fine not exceeding Kshs. 200,000.00 or imprisonment for a term not exceeding 6 months or both. Citing, the case of **Antony Mwangi Wakaza vs. The Republic, Criminal Appeal No. 21 of 2003 (2004) eKLR** counsel urged that an illegal sentence cannot be allowed to stand and must be set aside.

Analysis and Determination

20. We have considered the appeal and submissions. There are two issues in this appeal. The first is whether the finding of contempt of court was well founded. The second issue is whether the penalties imposed by the court are legal.

21. In addressing those issues, there can be no question, as the Judge correctly pointed out, that the rule of law demands compliance with court orders. In a recent decision in **Justus Kariuki Mate & another vs. Martin Nyaga Wambora & another [2017] eKLR**, the Supreme Court of Kenya underscored that court orders are "**people's solemn edict calling for obedience**". That court re-affirmed the words of Romer

J in **Hadkinson v. Hadkinson [1952] 2 All ER 567** that:

> **"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that 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 an order believes it to be irregular or even void."**

22. In the same judgment, the Supreme Court adopted with approval the words of the court in the English case of **M v. Home Office and Another [1992] 4 All ER 97** that*:*

> **"An order which is made by a court with unlimited jurisdiction is binding unless and until it is set aside. Common sense suggests that this must be so. Were it otherwise court orders would be consistently ignored in the belief, sometimes justified, that at some time in the future they would be set aside. This would be a recipe for chaos.""**

23. With that in mind it is common ground that on 5th May 2016, the ELRC court made an order that *"unless otherwise lawfully terminated, the claimant shall remain in his employment with the* [appellant]*."* By the same order, the court restrained the appellant *"from terminating the* [respondent's] *employment pending the hearing of his case."* It is also common ground, as we have already stated, that a subsequent attempt by the appellant to declare the respondent redundant was resisted and an interim order given on 20th July 2016 in terms that "an interim Preservatory orders (sic) to stay and/or stop the operation and effect of the [appellant's] letter dated 30th *June 2016 giving notice to terminate the [respondent's] employment with itself on account of redundancy pending interpartes hearing…"*

24. In his application giving rise to the impugned ruling, the respondent complained that the appellant had violated, and was in contempt of those orders in that the appellant "*has now refused to remit the salary for the month of January 2017 together with all accruing benefits…*" Responding to that application, the appellant deposed that the respondent had since September 2016 sought and obtained employment with different employers, namely Best Western Hotel and subsequently with Hotel Rio in Nairobi, and that the respondent had refused to report back to work after his leave which in effect would mean, if correct, that the respondent had thereby evinced an intention, no longer to be bound to his employment with the appellant.

25. Based on the diverse positions taken by the parties in that regard, the question whether the respondent had voluntarily left the employment of the appellant was relevant consideration. The learned Judge does not seem to have considered it necessary to interrogate whether the respondent had in fact declined to resume employment with the appellant after his leave was over and whether the respondent was in fact employed elsewhere. In the Judge's view, all that mattered was that there were court orders. The Judge stated:

> **"There are orders of this Court therein. The fact of the Claimant being sent on leave is not denied. Whether the Claimant failed to report back to work after he went on leave or that he has secured another job or jobs at various establishments, such are matters of fact that can be appropriately addressed by the Respondent before this Court. Such matters cannot be addressed by extra-judicial means. To operate outside of the Court over matters dealt herein is a direct affront on justice, rule of law and good order in a democratic society such as ours."**

26. In taking that view of the matter, we think the Judge failed to direct her mind to the pertinent questions namely, whether the orders of the court required the appellant to continue paying the respondent's salary after the respondent had himself, as it were, terminated the employment, and if so, whether there was willful disobedience of the court orders. The learned trial Judge therefore framed a wrong question thereby resulting in a wrong answer.

27. Under Section 4 of the Contempt of Court Act, Act No 46 of 2016 civil contempt entails willful disobedience of any judgment, decree or order or direction or other process of the court. It was therefore incumbent upon the lower court to direct its mind in that regard. In **Teachers Service Commission (TSC) vs. Kenya Union of Teachers (KNUT) &3 others [2015] eKLR**, this Court adopted with approval the words of Romer, LJ in **Hadkinson v. Hadkinson** (above) that:

> **"A person against whom contempt is alleged will also, of course be heard in support of a submission that having regard to the true meaning and intendment of the order which he is said to have disobeyed, his actions did not constitute a breach of it, or that, having regard to all the circumstances, he ought not to be treated as being in contempt."**

28. The learned Judge of the lower court refused to entertain or interrogate whether the respondent had indeed sought and obtained employment elsewhere and whether, should that be the case, the appellant remained under an obligation to continue paying the respondent's salary. Having failed to do so, we think the Judge fell into error.

29. It is also not clear from the record whether the appellant's Directors and Human Resource Manager were given an opportunity of being heard before the penalty and or sanction of 1 million was imposed on each of them. As a matter of law and procedure they were entitled to say something in defence before such a harsh sentence was imposed on them. That was not done which was in violation of the law and rights of the said persons. From our reading of the contempt application, the respondent seemed to be pre-occupied or concerned with remission of his monthly salary. There is no indication of a refusal by the appellant as to his retention or readmission into the appellant's premises. That was no attempt by the respondent to seek resumption of his employment. In our understanding there can be no payment of salary if the respondent did not seek resumption of rendering employment duties for the appellant. It is a question of reaping from what is not yours.

30. In our judgment therefore, there was no basis laid by the respondent for the court to punish the appellant's directors or the human resource manager and we must accordingly interfere with her decision. On that ground alone, the appeal must succeed.

31. In light of the conclusion we have reached, it is not necessary to consider the legality of the penalty meted out. Furthermore, we have not

had the benefit of full arguments regarding the interpretation of Section 28 of the Contempt of Court Act i relation to civil as opposed to criminal contempt as distinguished under Section 4 of that

32. The result is that the ruling and orders given on 6th April 2017 in ELRC case number 417 of 2016 are hereby set aside and substituted with an order dismissing, with costs, the respondent's application dated 22nd February 2017. The appellant will have the costs of this appeal.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of February, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

……

JUDGE OF APPEAL

S. GATEMBU KAIRU,

…….....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR