



**Mwarania v Cabinet Secretary, National Treasury and Planning & another;
Kenya Reinsurance Corporation Limited (Interested Party) (Petition
E034 of 2023) [2023] KEELRC 1171 (KLR) (15 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1171 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E034 OF 2023
NJ ABUODHA, J
MAY 15, 2023**

BETWEEN

JADIAH M MWARANIA CLAIMANT

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

**CABINET SECRETARY, NATIONAL TREASURY AND PLANNING 2ND
RESPONDENT**

AND

KENYA REINSURANCE CORPORATION LIMITED INTERESTED PARTY

RULING

1. By a motion dated March 30, 2023, the Petitioner/Applicant sought from the Court orders among others that:
 - i. Pending the hearing and determination of this application, this Honourable Court be pleased to issue conservatory orders restraining the 1st Contemnor herein by itself, agents and or employees from replacing the Petitioner herein as the Managing Director of the Interested Party.
 - a. The appointed third party from conducting and/or transacting any business of the Interested Party in the capacity of a Managing Director.
 - b. The appointed Third Party be restrained from holding himself out as Managing Director of the Interested Party.



- ii. Pending the hearing and determination of this application inter partes, a Conservatory order be and is hereby issued restraining;
 - iii. This Honourable Court do cite the Contemnors for contempt of Court order granted on February 23, 2023 and as extended on 13th and 28th March, 2023.
 - iv. Upon citing and holding the contemnors herein in contempt of Court orders under Prayer 5 hereinabove, the Honourable Court does and hereby commit the condemners to civil jail for 6 months or impose hefty monetary fine.
 - v. The publication issued by the 1st and 2nd Contemnor on 29th of March, 2023 purporting to announce the 3rd Contemnor as the Managing Director of the Interested Party be and are hereby declared null and void.
2. The application was supported by the affidavit of Jadhiah M. Mwarania, the Petitioner herein who deponed among others that:
- i. this Honourable Court vide its Orders given on February 23, 2023, held, in material part and of relevance, thus;
 - 1. “that Petitioner’s employment with the Interested Party is hereby preserved.
 - 2. That the process initiated by the Respondents and Interested Party to terminate and/or change terms of service for the Petitioner are hereby placed in abeyance.”
 - ii. The Honourable Court while extending the aforesaid orders on March 13, 2023 further directed as follows:-
 - 1. “that the orders granted on 23rd February 2023 are hereby extended for 14 days pending the hearing and determination of the application.
 - 2. That hearing on April 19, 2023”.
 - iii. On March 28, 2023 the Court further clarified as follows;
 - 1. “that the matter coming up for hearing on 19th April. 2023, the interim orders granted on 23rd February, .2023 are hereby granted to last until then or further orders of this Court. ”
 - iv. All the above Orders as granted by this Honourable Court were duly served upon the Respondents, Interested Party and the Cited Contemnors herein. The affidavits of service are duly filed and in the Court record.
 - v. THAT as at 23rd February, 2023, I was the Managing Director of the Interested Party and whose employment and office the said Court orders preserved as well as suspended the recruitment of a Managing Director of the Interested Party.
 - vi. THAT I am aware that the 2nd Contemnor herein as the Corporation Secretary is charged with, among other responsibilities, the duty to issues notices and agendas in duly convened meetings of the Board of Directors of the Interested Party.
 - vii. THAT while the order preserving my employment was still in place vide a public announcement appearing in the newspapers on Wednesday, 29th March, 2023, the 1st and 2nd Contemnors herein did purportedly issue a public notice announcing appointment of a third party as the Managing Director of the Interested Party.



- viii. That the Interested Party's Advocate on record did vide a letter dated 29th March, 2023, write to my advocate on record purporting that this Court's order had been served late, overtaken by events as allegedly the Interested Party's Board of Directors had already appointed a new Managing Director.
 - ix. That I am aware my advocates on record did respond to the Interested Party's said advocate's letter reminding them of the fact that the Court orders were still in force and the purported appointment of a new Managing Director would invite contempt proceedings.
 - x. That despite the contemnors having knowledge of the Court Orders as granted herein on 23rd February, 2023 and extended on 13th and 28th March, 2023, the Contemnors herein did not revoke their public announcement as published on 29th March, 2023. I am advised by my Advocates on record which advice I verily believe to be true, that any meetings relating to my replacement as the Managing Director of the Interested Party as well as recruitment and or appointment of the Interested Party's Managing Director convened, if at all it was convened, on or after the 23rd February, 2023 is contemptuous, invalid, illegal and of no legal consequences for reasons, among others;
 - a. There could be no valid Board Resolution of the Directors of the Interested Party convening a meeting to discuss issues relating to my employment which is the subject matter of this case as the same would be sub judice.
 - b. There could be no valid notice that would be issued to convene a meeting of the Board of the Directors of the Interested Party to discuss matters relating to my employment and or my replacement yet I presented a petition to this Court and secured an interim Court order, restraining, among others, the recruitment process of a new Managing Director as well as preserved my position as the Managing Director of the Interested Party. Refer to the Court Order of 23rd February, 2023). By the Contemnors and any other person(s) seeking to conduct recruitment proceedings and or purporting to have appointed a Managing Director is a blatant breach of the said Court Order and to that extent null, void and of no consequence.
 - xi. That the above complained of acts of commission and omission;
 - a. Occurred at the express and implicit authority of the contemnors jointly and or severally.
 - b. Occurred in connivance and conspiracy of the contemnors jointly and or severally.
 - c. So occurred and whilst the contemnors jointly and severally had power and duty to prevent occurrence thereof, deliberately failed to take any such reasonable step(s) to prevent the occurrence.
 - d. Were facilitated and or aided by the contemnors jointly and severally.
3. The Interested Party filed a replying affidavit through one Dr. Catherine Kimura who deponed among others that:
- i. I am the Chairperson, Board of Directors of the Interested Party, duly conversant with the facts of this case, competent and authorized to swear this Affidavit for and on behalf of the Interested Party.



- ii. Further, I have authority from the 1st and 2nd Contemnors to swear this Affidavit on their behalf.
- iii. Firstly, I am advised by our Advocates on record and which advise I believe to be true that Courts have held that “An order that has lapsed ceases to exist and cannot be the basis upon which any contempt proceedings can be founded.”
- iv. Prior to the issuance of the Court Orders on 23rd February 2023, the 1st Contemnor had completed interviewing Six (6) candidates for the position of Managing Director of the Interested Party on 16th February 2023 and the top three (3) candidates names’ had been forwarded to the 1st Respondent for concurrence. The 1st Contemnor was directed to proceed with the highest-ranking candidate.
- v. Upon service of the preservation Orders on 24th February 2023, the appointment for the position of the Managing Director was held in abeyance.
- vi. On 13th March 2023, the trial Court was not sitting and all parties were present in Court whereby a date for hearing on 19th April 2023 was assigned by the Court Clerk.
- vii. On 14th March 2023, the Petitioner served the Interested Party with a Court Order whereby the Orders issued on 23rd February 2023 were extended for 14 days on 13th March 2023.
- viii. The Orders issued on 13th March 2023 lapsed at midnight on 27th March 2023.
- ix. In the absence of any valid orders stopping the 1st Contemno conducting its normal business, the 1st Contemnor proceeded to hold its Board Meeting on 28th March 2023 at 2:00 PM whereby the 1st Contemnor appointed Dr. Hillary Maina Wachinga as the Managing Director of the Interested Party.
- x. In the said minutes, we considered the fact that the Orders issued by the Court on 13th March 2023 had lapsed and thus the 1st Contemnor was at liberty to proceed with the appointment.
- xi. Subsequently, the 3rd Contemnor proceeded to notify Dr. Hillary Maina of his appointment to the position of Managing Director of the Interested Party.
- xii. On the same day at 5:18 PM, I am informed by our Advocates on record that the Petitioner's Advocates served them a copy of the Orders extended by the Court to last until 19th April 2023.
- xiii. I am advised by our Advocates on record and which advise I believe to be true that there were no orders in place stopping the 1st Contemnor from appointing the Managing Director. In any event, the Petitioner did not even copy the Respondents or the Interested Party in its letter requesting for extension of Orders.
- xiv. The contemnors had neither been served with the Order nor had knowledge of the extension by the time they convened the 1st Contemnor’s Board meeting.
- xv. I am advised by our Advocates on record and which advise I believe to be true that there were no orders in place capable of being disobeyed.
- xvi. I am advised further by our Advocates on record and which advise I believe to be true that in any event the Orders extended on 28th March 2023 cannot be enforced by virtue of Rule 17(4) of the Employment and Labour Court (Procedure) Rules, 2016.

4. The Petitioner filed a further affidavit in which she additionally stated that:



- i. Indeed the Contemnors were duly served with the Court Orders of 23rd February, 2023 on 24th February, 2023 before they attempted to disobey the same by appointing my replacement.
 - ii. On the 13th of March, 2023, the Court on its own volition extended the Conservatory Orders up to of 19th April, 2023 a date set for the Inter partes hearing of my application.
 - iii. It is not true that the Orders issued by the Court on 13th March, 2023 lapsed on 27th March, 2023 as the same lapsed on 28th March, 2023 at midnight after 14 complete days of computation.
 - iv. The Contemnors were duly served with the Court Orders issued on 28th of March, 2023 at 2.00 p.m before their purported meeting set for 2.00 p.m which they proceeded with in order to defeat the Orders issued by the Honourable Court the same day at midday and the same were served upon them.
 - v. The Honourable Court is invited to note the date of 5th May, 2023 has been inserted on the minutes of 28th March, 2023 which indeed goes on to prove the length to which the Contemnors are determined to mislead this Court as the date for confirmation of the same is in the future and the minutes are of no consequence.
 - vi. Again the aforesaid minute relate to a meeting purportedly held between 2.00 p.m and 2.25 p.m yet the letter of appointment was issued and acknowledged in a record 2 minutes in order to defeat the effect of the Court Order issued by the Court.
 - vii. The service of the Court Orders on the firm of M/s. J.K. Kibicho & Co. Advocates on the 28th of March, 2023 at 5.18 p.m. was indeed for record purposes as the Contemnors had already been served personally on the same date at 2.00 p.m.
 - viii. The Contemnors having admitted to having a meeting on 28th March, 2023 when the Court Orders were still in place should be found and held to be in contempt in readiness for punishment.
5. In support of the motion, Counsel for the Petitioner/Applicant Ms. Guserwa submitted among others that the 3rd contemnor in her replying affidavit sworn on 17th April 2023 admitted that the contemnors were indeed served with Court order. The 3rd contemnor at paragraph 7 of her affidavit admitted that she was served with conservatory orders dated 23rd February 2023.
 6. Counsel further submitted that the 3rd Contemnor was aware that on 13th March, 2023, the Court was not sitting and all parties present when a hearing date for 19th April 2023 was assigned by the Court. On 14th march 2023 the Petitioner served the Interested Party with a formal Court order extending the preservatory orders until 19th April, 2023. Further, the 3rd contemnor deponed that their advocates on record informed them on 28th April, 2023 at 5:18 pm that they had been served by the Petitioner with a Court order extending the preservatory orders until 19th April, 2023. The Petitioner in their supplementary affidavit sworn on 18th April, 2023 clarified that service of the Court order dated 28th March, 2023 had been effected upon the contemnors on the same day. The service on the contemnors' advocates was therefore for record purposes.
 7. Ms. Guserwa therefore submitted that from the affidavits of the Petitioner and the 3rd contemnor, it was clear that service of all the court orders were effected upon the Respondents and contemnors in



good time whenever they were issued. Therefore the contemnors having proceeded to recruit a new managing director of the Interested Party acted in violation of the Court's order.

8. The Court in extending the orders of 23rd February, 2023 on 13th March, 2023 and 28th March, 2023 was preserving the subject matter pending hearing and determination of the application set for 19th April, 2023. The contemnors having been served with the Court order certainly understood that the Court had every intention of preserving the status quo in existence prior to 23rd February, 2023 until hearing and determination of the application.
9. Counsel submitted that the defence put up by the contemnors that the orders of 13th March, 2023 lapsed on 27th March, 2023 were to last for a period of 14 days was untenable as the orders of 13th March could not be read in a partial manner. The same order which extended the orders of 23rd February 2023 for 14 days indicated that the preservation was pending not only the hearing but also the determination of the application and not the 14 days mentioned therein. The court order was not issued in lacuna but with the purpose of preserving the subject matter of the application pending hearing and determination of the application. The language and drafting of the court order ensured that even after lapse of 14 days, the preservatory order continued to be in force until the application was heard and determined.
10. In support of the foregoing submissions Counsel relied on the cases of *Bloggers Association of Kenya (Bake) v Attorney General & 5 others* [2018] eKLR, *Teachers Service Commission v Kenya National Union of Teachers & 2 others* [2013] eKLR and *Salome Nyambura Kang'ethe T/A Shalom Enterprises & 13 others v Nairobi City County & 8 others* [2016] eKLR.
11. Ms. Guserwa further submitted that the events that followed were incomprehensible and designed to defeat the application. After the conclusion of the meeting at 2.25 pm, the new Managing Director executed the letter of appointment at 2.27 pm. This was within two minutes of his appointment. It was expected that the letter dated 28th March, 2023 was to be drafted, executed by the Board's Chairman, sent to the new office holder, he would take time to peruse the same, then execute it and finally deliver it to the contemnors. Considering the manner in which common course of natural events, human conduct and public business is conducted, the sequence of events alleged to have happened on 28th March, 2023 were fictitious and were made and designed to defeat the application.
12. Ms. Guserwa further submitted that a perusal of the letterhead of the Interested Party on which the appointment letter allegedly issued on 28th March, 2023 reveal that Hon. (Amb.) Ukur Yetani (Cabinet Secretary, National Treasury and Planning) is described as the Cabinet Secretary for National Treasury and Planning yet as at that date the said gentleman had been replaced. The contemnors herein clearly devised a plan to defeat the court order of 23rd February, 2023, 13th March, 2023 and 28th March, 2023 and proceeded to execute the same under the guise of lapse of an order which had no intention of lapsing until its purpose was complete.
13. Counsel for the contemnors and Interested Party Mr. Cheruyiot submitted that the terms of the order issued on 13th March 2023 were clear that they had been extended for 14 days and which orders the alleged contemnors duly complied with. The alleged contemnors did not willfully disobey any orders of the Court. The orders issued on 23rd February, 2023 were extended for 14 days on 13th March 2023 and which orders lapsed at midnight of 27th March, 2023. In absence of any valid order or otherwise knowledge of the orders stopping the alleged 1st contemnor from conducting its normal business, the 1st contemnor proceeded to hold its Board meeting on 28th March, 2023 at 2.00 pm whereby it appointed Dr. Hillary Maina Wichiga as the managing director of the Interested Party. The order extending the orders that had lapsed on the midnight of 27th March 2023 was served upon the alleged contemnors on



- 28th March at 5:18 pm when the impugned appointment had already been concluded. According to Counsel, the extension of the orders were issued ex parte and the alleged contemnors could only have known of the extension upon service of the order which was done on the evening of 28th March, 2023 when the alleged contemnor had already appointed a Managing Director of the Interested Party.
14. According to Counsel, the Petitioner applied for the extension of the orders on the belief that they had lapsed. It was their submission that if the orders were pending the determination of the application and not just for 14 days, it begged the question why the Petitioner sought extension of the orders on 28th March, 2023. This meant the Petitioner too interpreted the orders the same way the alleged contemnors interpreted the same that is to say they were to last for 14 days.
 15. Regarding the minutes, Counsel submitted that they clearly indicated at the heading that the board meeting was held on 28th March, 2023 and thus there was an error. Further, the appointed managing director signed his appointment letter on the same date and after the meeting which confirmed the sequence of the events were not fictitious.
 16. Counsel further submitted that the orders in issue were issued contrary to Rule 17(4) of the Employment and Labour Relations Court (Procedure) Rules which prohibited any further extension of the said orders for a third time. In this regard Counsel relied on the case of *Omega Enterprises (Kenya) Ltd v Kenya Tourist Development Corporation & 2 others [1998]* eKLR.

Determination

17. Contempt of Court is that conduct or action that defies or disrespects authority of the Court. Section 5 of the *Judicature Act* confers jurisdiction on superior Court to punish for contempt. Order 40 Rule (3) of the *Civil Procedure Rules* 2010 provides that in cases of disobedience or breach of any terms of a temporary injunction, the Court granting the injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months.
18. 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) stated:

“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. It is 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.”
19. Supreme Court of India in the case of *T. N. Godavarman Thiru Mulpad v Ashok Khot and Another [2006] 5 SCC* observed as follows:

“Disobedience of this Court’s order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs.”



20. It is important to bear in mind that contempt of Court is in the nature of criminal proceedings and therefore proof of the cases against the alleged contemnor is higher than balance of probability as in civil cases but not beyond reasonable doubt as in criminal cases. This is because in contempt proceedings the liberty or property of the alleged contemnor is at stake if found guilty of contempt.
21. In the case of *Gathera K. Mutitika v Baharini Farm Ltd* [1985] KLR 222 the Court stated that:

“Recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the later Master of the Rolls in the case of *Re Clement* seem much in point: ‘It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject.’”
22. From the record, this matter came to court ex parte on 23rd February, 2022 before Hon. Lady Justice Mbaru when she among others issued the conservatory orders herein and directed that the same be heard inter partes on 13th March, 2023. The Court was not sitting on 13th March 2023. The matter was however placed before Gakeri J. who extended the interim orders for 14 days pending the hearing and determination of the application. Meanwhile the matter was from the record, fixed for hearing on 19th April, 2023.
23. On 28th March, 2023, Counsel for the Petitioner caused the file to be placed before me for the extension of interim orders which I did as requested to last until 19th April, 2023 when the matter was scheduled for hearing.
24. The bone of contention as I understand it is over the interpretation of the directions issued by Hon. Justice (Dr.) Gakeri on 13th March, 2023 when the file was placed before him. The Learned Judge extended the interim orders of 23rd February, 2023 for fourteen days and further said pending the hearing and determination of the application. Fourteen days from 13th March, 2023 lapsed on 27th March, 2023 however the matter had been fixed for hearing on 19th April, 2023 which was some twenty four days from the 27th March 2023. From the record, Mr. Kimani appeared for the Interested Party while Tony was holding brief for Ms. Guserwa for the Petitioner and Kirina appeared for 1st and 2nd Respondents on 13th March, 2023. It was further minuted presumably by the Registry staff that the file was to be placed before the twin Court Judge (Dr. Gakeri J.) for extension of interim orders. This was done. However it was not clear whether the attention of the Judge was drawn to the fact that the matter was scheduled for hearing on 19th April, 2023 when he was issuing the directions.
25. The Interested Party has taken the position that the orders were extended for 14 days from 13th March, 2023 and therefore lapsed on 27th March a midnight hence the appointment of the Interested Party’s Managing Director was not in breach of any court order. Ms. Guserwa on the other hand has contended that the directions given by Hon. Justice (Dr.) Gakeri could not be read in two parts. The directions according to Counsel were that the orders were to last until 19th April, 2023 when the matter was scheduled for hearing. The appointment of the Interested Party’s Managing Director was therefore in contempt of Court for which the Interested Party and its responsible agents should be found liable and appropriately punished.
26. Counsel for the Interested Party Ms. Cheruyoit posed a pertinent question to Ms. Guserwa. That is, if the orders were to last until the 19th April, 2023, then why did Ms. Guserwa move the Court on



- 28th March, 2023 for extension of the orders. According to Ms. Cheruyiot, Counsel for the Petitioner too must have interpreted the directions by Hon. Justice (Dr.) Gakeri that the orders were to last for fourteen days from 13th March, 2023 which lapsed on 27th March, 2023 hence the causing of the matter to be mentioned on 28th March, 2023 for extension of interim orders.
27. Another important issue that was raised by Counsel for the Interested Party was concerning Rule (4) of the Court rules which provides that an ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of the parties or by order of the Court for a period of not exceeding fourteen days.
28. This rule has presented practical challenges in implementation. It purports to limit the life of an ex parte injunction to no more than twenty eight days. However in reality and practice parties have mutually agreed to extend interlocutory injunction for a much longer period to enable them resolve preliminary issues such as filing of affidavits and documents before the application can be heard. Of course the mischief which was intended to be cured was the tendency by a party in whose favour the injunction was granted to seek endless extension of the same without setting the application for hearing.
29. From the foregoing observations, the Court takes the view that there was apparent confusion or ambiguity on the face, the directions given of Hon. Justice (Dr.) Gakeri on 13th March, 2023. The directions yield both interpretations given to it by the contesting parties. It is perhaps this lack of clarity that prompted the Counsel for the Petitioner to move the Court on 28th March, 2023 for the extension of the same.
30. The Court is alive to the nature of the issue in contestation in this petition. It concerns the separation from employment between the Petitioner and the Interested Party who sought and replaced the Petitioner. Employment can be an emotive issue especially at the level the Petitioner was serving. The Court therefore fully appreciates and understands the brain games Counsel for the parties have displayed in interpreting the directions by Dr. Gakeri J. on 13th March, 2023.
31. The Supreme Court of India in the case of Indian Airports Employees' Union v Ranjan Chatterjee & Another AIR 1999 SC 880 stated:
- “In order to amount to civil contempt, disobedience must be wilful. If disobedience is based on the interpretation of Court’s order, notification and other relevant documents, it does not amount to wilful disobedience.”
32. As observed earlier, the directions issued by Hon. Justice (Dr.) Gakeri were ambiguous and could yield to the interpretation that the interim orders issued on 23rd February 2023 were to last for fourteen days from 13th March and or hearing and determination of the application. The Interested Party took advantage of the first interpretation and appointed the Managing Director immediately in their interpretation the orders lapsed. Counsel for the Petitioner took the second interpretation hence contended that the Interested Party were in contempt, Counsel for the Petitioner however has not reasonably come clear on why on 28th March, 2023 they moved the Court ex parte for the extension of the orders if they were to last until the hearing and determination of the application on the 19th April, 2023.
33. As noted earlier in this ruling, contempt of Court is an offence



of criminal nature. A person may be sent to jail or subjected to execution process against their property. The Court must therefore be clear that the alleged contemnor willfully disobeyed the Court order the contempt must be obvious and clear and not derived from several interpretation of the order allegedly disobeyed. If the interpretation held by the contemnor, albeit by acting witty, is one of the reasonable interpretations of the order of the Court there can be no contempt.

34. In conclusion, the Court finds and holds that the Interested Parties were within their right to interpret the ambiguous directions of the Court the way they did. Their immediate action of appointing the Interested Party's Managing Director may have been sharp but they only took advantage of the ambiguity. The Court will therefore not hold the Interested Party in contempt of Court in the circumstances. The application is therefore disallowed. Costs shall abide the outcome of the petition.
35. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF MAY 2023

ABUODHA J. N.

JUDGE

In the presence of:-

Museve for the Petitioner

Cheruit for Interested Party

Ms. Rop for the Respondent

