



Mbugua & another v Kobia & 5 others (Judicial Review Miscellaneous Application E003 of 2023) [2023] KEELRC 2336 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2336 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E003 OF 2023

HS WASILWA, J

OCTOBER 5, 2023

IN THE MATTER OF: AN APPLICATION BY THE APPLICANT, DR. SKITTER WANGECI MBUGUA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI AND MANDAMUS DIRECTED TO THE NATIONAL COHESION AND INTEGRATION COMMISSION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA; THE EMPLOYMENT ACT-2007; THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2011; FAIR ADMINISTRATIVE ACTIONS ACT, 2015 AND THE LAW REFORM ACT (CAP 26)

BETWEEN

SKITTER WANGECI MBUGUA APPLICANT

AND

NATIONAL COHESION AND INTEGRATION COMMISSION . RESPONDENT

AND

SAMUEL KOBIA 1ST CONTEMNOR

WAMBUI NYUTU 2ND CONTEMNOR

ABDULAZIZ ALI FARAH 3RD CONTEMNOR

DANVAS MAKORI 4TH CONTEMNOR

SAM KONA 5TH CONTEMNOR

DORCAS KEDOGO 6TH CONTEMNOR



RULING

1. This Ruling is in respect of the Applicant's Application Notice dated 11th April, 2023 filed pursuant to Section 5 of the *Judicature Act*, Rules 23.3 & 81. 4 of the *Civil Procedure Rules of the High Court of England and Inherent Power of the Court*, seeking for the following Orders;
 1. Spent.
 2. Spent.
 3. The letter and memorandum both dated 5th April, 2023 be stayed and allowing the applicant to resume her duties and earn her full salary pending the hearing and determination of this Application.
 4. Rev Dr. Samuel Kobia, Wambui Nyutu, Abdul-Aziz Ali Farah, Dr. Danvas Makori, Sam Kona and Dorcas Kedogo being Commissioners of the Respondent be committed to prison for a term not exceeding 6 months for failing to comply with the orders of this Court issued on 20th February, 2023.
 5. The letter and Memorandum both dated 5th April, 2023 are in breach of the Court order of 20th February, 2023 and are therefore null and void.
 6. The Respondent does pay the claimant the costs of this Application.
2. The Application is based on the following grounds:-
 - a. That this Court issued orders on the 20th February, 2023 baring the Respondent from taking any further disciplinary action against the Applicant until the JR Application is heard interpartes.
 - b. Despite being aware of the Orders, the Respondent suspended the Applicant by the letter of 5th April, 2023 pending investigation of the issues that arose from this suit.
 - c. It is averred that the Respondent has disobeyed this Courts orders by suspending the Applicant when there were express orders not to take any further disciplinary action until this matter is heard.
 - d. It is stated that the Respondent does not have powers to carry out investigation on a matter that is before the Court. Furthermore, that the purported investigation is a retaliation by the Respondent to the Orders issued by this Court which actions are illegal and in contempt of the Court Orders.
 - e. It is stated that this Court has powers under Order 52 Rule 3 of the Supreme Court Rules of United Kingdom to allow the Application herein.
3. The Application is also supported by the affidavit of Dr. Skitter Wangeci Mbugua, the ex parte Applicant, deposed upon on the 11th April, 2023. In the affidavit, the Applicant reiterated the grounds of the Application and added that he was informed by the chairperson that he was suspended because of instituting these proceedings.
4. She stated further that the suspension is in contempt of Court orders issued on the 20th February, 2023 and in violation of section 46(h) of the *Employment Act* and Article 41 of *the Constitution*.



Additionally, that she has received several other memorandums aimed at intimidating her to withdraw the suit herein.

5. It is her case that after she was served with the suspension notice, the Notice was communicated to all employees at the Respondent and she was then locked out of her office and ordered to surrender all property belonging to the Respondent such as official phone, laptop and office car driver and her security detail. In addition, the Respondent informed the press that the applicant had forged her documents resulting to the suspension, which the media sensationalized to her detriment.
6. In the further affidavit sworn on 24th May, 2023, the Applicant stated that she received another letter from the Respondent dated 5th May, 2023 indicating that the suspension will continue for a further 30 days and that she would be eligible to half salary but that she has not received her April salary till date, which action is in violation of her rights.
7. The application is opposed by the Respondent who filed a replying affidavit deposed upon on the 25th May, 2023 by Dr. Samuel Kobia, the 1st Contemnor herein and the Chairperson of the Respondent Commission.
8. The affiant denied being in contempt of Court orders issued on 20th February, 2023 and stated that the Orders of this Court only prohibited the Respondent from proceeding with the disciplinary action commenced through the letter of 10th November, 2022, reference number NCIC/ 372.
9. He stated that the letter of 10th November, 2022 listed several charges against the Applicant including; acting contrary to instruction on failing to attend the senior staff retreat held at English Point Marina from 9th to 15th October, 2022, using the Respondent's vehicle to travel to Mombasa contrary to the Respondent's decision of 8th October, 2022, recruiting Florence Abwayo, Maureen Kiprotich and Triza Abuya without approval of the Commission, failure to implement supplementary budget of Kshs 100 Million as approved, failure to provide working calendar for members of staff and commissioners, failure to follow up on grant of Kshs. 35 Million by COMESA and failure to follow up on projects discussed by the Commission and delegated to her.
10. The letter of 5th April, 2023 on the other hand addressed the issue of the forged letter of employment dated 6th November, 2020 purporting that her employment was for a term of 5 years with effect from 1st December, 2020.
11. He stated that contrary to the said letter the Applicant was competitively recruited and offered employment on a contract period of 3 years with effect from 1st December, 2020. He added that the 3-year contract is in line with Mwongozo, the Code of Corporate Governance for state corporations which prescribes tenure of chief Executive officers to a term of 3 years' renewable once.
12. It is averred that following the said alteration of employment documents, the Commission resolved to suspend the Applicant to allow it carry out further investigations into the alleged gross misconduct and criminal offense that was perpetrated by the applicant.
13. It is contended that since the Applicant is the Respondent's CEO, she holds a position of influence and the custodian of all Respondent's records which the Respondent is apprehensive that she might either damages evidence or influence witnesses.
14. The Affiant also took issue with the fact that the Applicant opted to cite some members of the Commission and left one Eng. Philip Okundi when he was part and parcel of the Commission that resolved to suspend the Applicant.



15. The affiant stated that after further scrutiny of the records produced in court, the Respondent discovered that the Applicant has altered her employment letter to a contract period of 5 years instead of 3 years and removed the 6 months' probation period in order to secure a mortgage facility of Kshs 42,869,622 at KCB Bank Kenya Limited.
16. It is contended that the alleged criminal acts and gross misconduct are grave and if proved may severely tarnish the Respondent's name who depend heavily on Donors to fund its operations.
17. The Deponent stated that the Respondent is empowered to discipline its employees as provided for under Section 41 of the *Employment Act*, section 71 of the Public Service Act and clause 11 of the Respondent's Human Resource manual.
18. Upon suspension of the Applicant, the Respondent appointed an acting CEO to continue with its operations. He added that the defence against the Applicant's JR is so strong that this Court is likely to dismiss it after hearing the Preliminary objection of 9th March, 2023. Therefore, that the allegations that the Respondent is pressuring the Applicant to withdraw the JR is far from the truth.
19. On the alleged Victimization Memos, the affiant stated that the Memo of 29th March, 2023 was for terminating the services of Florence Abwayo and Lillian Njeri Gitonga who had been unprocedurally and illegally deployed to the respondent's employment which has strained the Respondent's Limited budget. On the Memo of 22nd March, 2023, the Affiant stated that the same was communicating the failure by the Applicant to reinstate the employees' and Commissioners' Medical cover which had been suspended for two months for failure to remit funds, which funds were ready for release but delayed by the Applicant.
20. On the property withdraw on suspension, the Affiant stated that these assets such as laptops, vehicle, driver and security are to be utilized by the Applicant in rendering her services to the Respondent and thus on suspension the said assets had to be withdrawn because the applicant will not be rendering any service to the Respondent during that period.
21. The affiant distanced itself from the allegations that it gave misleading information to the media for printing. Further that it has never dispatched anyone to trail the Applicant.
22. Based on the foregoing the Affiant stated that the Respondent has not violated any Orders made by the Court and urged this Court to dismiss the Application with costs.
23. The Application was disposed of by written submission with the Applicant filing on the 26th May, 2023 and the Respondent on the 30th May, 2023.

Applicant's Submissions.

24. The Applicant submitted on three issues; whether the contempt application is properly before Court, whether the Orders of 20th February, were served upon the contemnors and whether the contemnors are guilty of Contempt of Court orders issued on 20th February, 2023.
25. On the first issue, the Applicant submitted that section 5 of the *Judicature Act*, Section 3 and 63 of the *Civil Procedure Act* and Order 40 of the Civil Procedure Rules, 2020 provide for Substantive and procedural law in instituting contempt proceedings. In this they relied on the case of Ramadhan Salim V Evans M Maabi t/a Murphy auctioneers and another Civil Appeal no. 69 of 2015[2016] eklr



where the Court relied on the case of *Kyoga Hauliers Limited v Long Distance Truck Drivers & Allied Workers Union* [2015] eKLR, which held that:-

“Applicant seeks by that Notice of Motion a finding that the respondents have failed to obey an order of injunction made by Magistrate’s Court in Mombasa SRMCC No. 1198 of 2014. The order of injunction, as can be seen from applicant’s exhibit “RSK2”, was made under Order 40 of the Civil Procedure Rules. When an injunction is issued under Order 40 it is the court that issues that order that is competent to hear an application of contempt when there is a disobedience of the order”.

26. It was submitted that contempt of Court is an indispensable procedural remedy that enables the Court promote the enforcement of its Orders in the interest of the parties and to guarantee the administration of justice and respect of law. In this they relied on the case of *Econet wireless Kenya Ltd V Minister for information and Communication of Kenya* and another [2005] eklr.
27. Based on that, the Applicant submitted that the Application herein is properly before this Court.
28. On the second issue, it was submitted that they lodged this Application on 19th February, 2023 and upon obtaining orders, they served on the Respondents on 3rd March, 2023. Further that the Applicant’s advocates wrote the letter of 5th April, 2023 informing the Respondent’s of the courts orders and import thereof. Therefore, that the contemnors were aware of the Orders of the Court but still acted in breach. The Applicant argued further that knowledge supersedes personal services as was held in *Shimmers Plaza Limited V National Bank of Kenya Limited* [2015] eklr where the Court relied on the decision by Lenaola J in the case of *Basil Criticos Vs Attorney General and 8 Others* [2012] eKLR pronounced himself as follows:-

“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary”

29. On whether the contemnors are guilty of contempt of Court orders, the Applicant submitted that the Respondent through the contemnors herein acted in violation of the express orders issued by this Court and suspended the Applicant from her office and despite demanding compliance of the said court order by the letter of 5th April, 2023, the contemnors stood their grounds and refused to purge the contempt and continue to place her on suspension.
30. The Applicant urged this Court to find the contemnors guilty and commit them to civil jail.

Respondent’s submissions.

31. The Respondent similarly submitted on three issues; whether the contemnors are guilty of contempt, whether the orders issued on 20th February, 2023 extended to disciplinary proceedings outside the notice to show cause reference number NCIC/ 327 dated 10th November, 2022 and whether the suspension of the claimant and the Appointment of the Mr. Harrison Kariuki as the acting CEO and commission secretary was void.
32. On the first issue, the Respondent submitted that the suspension of the Applicant on 5th April, 2023 was distinct and wholly separate from the disciplinary action commenced vide the Notice dated 10th November, 2022, therefore that it did not violate the Orders of this Court.
33. The Respondent reiterated the importance of obeying the law and Court orders and relied on the case of *Econnet Wireless Kenya Ltd V Minister for information and communication of Kenya &*



Another [2005] eklr where the Court relied on the case of Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990, (unreported), where the Court of Appeal said:-

“..... It is essential for the maintenance of the Rule 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”

In *Hadkinson –v- Hadkinson* (1952) 2 All ER. 567, it was held that: “It is plain and unqualified obligation of every person against or in respect of, who 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.”

34. It was submitted that the standard of proof in contempt application is higher than proof on a balance of probability as was held in *Mutitika V Baharini Farm Limited* [1985] eklr. While the test for establishing contempt is based on proof of four elements being; terms of Orders, knowledge of proper notice of terms of Orders, Breach of the terms of order and The conduct of the breaching party was deliberate. These ingredients were listed by Mativo J in the case of *Samuel M.N Mweru & Others V National Land Commissions & 2 others* [2020] eklr.
35. Based on the foregoing, the Respondent submitted that the applicant has not meet the high standard required and the elements required to proof contempt of Court because firstly, the orders of the Court barred the Respondent from proceeding with disciplinary action with regard to the Notice to show cause dated 10th November, 2022 and not against the entirety of the Respondent’s right to perform its administrative mandate. It was argued that the suspension was to pave way for investigation into the authenticity of the Applicant’s letter of Appointment dated 6th November, 2020 which had been altered and terms of contract increased from 3 years to 5 years, which issue was a new cause of action that arose and discovered when the applicant filed this Suit.
36. The Respondent maintained that the prohibition of disciplinary action did not extend outside the issues raised in the Notice to show cause of 10th November, 2022 and added that parties are bound by their pleadings and orders ought to confine to the what has been prayed for as held in *Independent Electoral and Boundaries Commissions and another V Stephen Mutinda Mule*[2014] eklr and the Supreme Court case of *Raila Amolo Odinga and another V IEBC & 2 Others* [2017] eklr and being that the issues on forgery was not part of the orders sought, the orders of 10th February, 2023 cannot apply therein to breathe life to the contempt application. Moreover, that judicial Review orders does not operate as an automatic stay to further disciplinary proceedings outside what was stopped.
37. The Respondent submitted further that following their lawyers’ advice in interpreting the Court orders, they understood the Orders to have effect of stopping disciplinary action on items listed in the Show cause letter and not with regards to any other disciplinary issue that may arise as seen in this case, therefore that the respondent genuinely believed that they acted in accordance with the law and were not in contempt of Court Orders.
38. On the last issue, the Respondent submitted that the appointment of Harrison Kariuki as the acting CEO was to ensure the office does not operate in a lacuna
39. In conclusion, the Respondent submitted that the contemnors herein have not violated the Orders of this Court issued on 20th February, 2023 but in case the Court interpret the actions of the Respondent otherwise, then the move was not deliberate and mala fide to warrant them being held in contempt.



He added that contempt order should be issued as a means of last resort as was held in *Katsuri Ltd V Kapruchand Depar Shar* [2016] eklr.

40. I have examined all submissions and averments of the parties herein.
41. The application before me relates to this court's orders of 20/2/2023 which the applicant avers were disobeyed by the respondents alleged contemnors.
42. The applicants content that the respondents disregarded the orders of the court by suspending the applicant vide a letter of 5th April, 2023 when there were express orders not to take any further disciplinary action until the matter is heard.
43. On 20/2/2023, the applicant filed this Judicial Review application seeking various orders. Upon hearing the applicant experte on the application to institute Judicial Review proceedings. I certified the application urgent and allowed the prayer No.2 on leave to institute Judicial Review proceedings and prayer No.3 that leave so granted to operate as stay of any further disciplinary action against the applicant pending hearing and determination of the Judicial Review application.
44. The application for JR was finally filed and later on this court was informed that the respondents despite being served with the orders of the court of 20/2/2023 proceeded to suspend the applicant from duty hence this application.
45. In this response, the 1st contemnor Dr. Samuel Kobia the Chairperson of the Respondent Commission denied being in contempt of this court's orders indicating that the orders so granted only prohibited the respondent from proceeding with the disciplinary action commenced through the letter of 10th November, 2022, Ref. Nov NCIC/372. He also averred that the letter of 5th April 2023 addressed other issues concerning a forged Letter of Employment dated 6th November, 2020 purporting that her employment was for a term of 5 years with effect from 1st December, 2020.
46. That it is on this basis, that the respondent resolved to suspend the petitioner from employment.
47. In determining this application I note that the orders issued by this court from the court record were as follows:-
 1. "That the application is certified urgent and is allowed in terms of prayer No. 2 & 3.
 2. The leave so granted to operate as stay of any further disciplinary action against the applicant pending hearing and determination of the Judicial Review application.
 3. The application of Judicial Review be filed within 14 days from this date.
 4. Mention on 6/3/23 for further directions".
48. The orders made no reference to any letter and in particular the letter of 10th November 2022 Ref. No. NCIC/375 as referred to by the 1st contemnor.
49. The order was quite clear and the applicant avers that the orders were served upon the respondents on 3rd March, 2023.
50. The applicants also aver that their counsel wrote to the respondents on 5th April, 2023 informing them of the court order and the import thereof.
51. It is therefore clear that the contemnors were aware of the orders of the court but still went ahead to act in breach thereof.



52. As submitted by the respondents herein, the contemnors avers that they were aware of the orders but it was only in respect of the letter of 10th November, 2022 and not any other disciplinary process.
53. The respondent further submitted that the matter leading to the suspension of the applicant were based on a different set of matters not based on the letter of 10th November, 2022 and therefore are not guilty of contempt.
54. My understanding of the law is that court orders ought to be obeyed. The order that this court gave on 20/2/2023 was extracted and signed by the Deputy Registrar on 20/2/2023.
55. This order was explicit that the leave so granted to institute Judicial Review proceedings do operate as stay of any further disciplinary action against the applicant pending the hearing and determination of the Judicial Review application.
56. The Judicial Review application is yet to be determined to date. In the interviewing period, the applicant was subjected to further disciplinary action whether based on the previous show cause letter of 10/11/2022 or on any other valid reasons, this court had in its orders of 20/2/2023 stayed any further disciplinary action against the applicant.
57. The respondents contemnors were aware of these orders but chose to disregard them.
58. In *Econnet Wireless Kenya Ltd Vs Minister of Information & Others eKLR (2005) Supra*, the Court of Appeal emphasized the need for the maintenance of the rule of law and good order and authority and dignity of the court by obeying court orders.
59. In my view, the respondents acted deliberately in disregard of the orders granted by this court and cannot escape from this guilt by indicating that they were right.
60. My finding is that the contemnors as cited are all guilty of contempt and these are the orders of this court.

RULING DELIVERED VIRTUALLY THIS 5TH DAY OF OCTOBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Makori for Exparte Applicant – present

Mbugua for Respondents – present

Court Assistant - Fred

