



Njambi v National Health Insurance Fund; Amwoga & another (Contemnor) (Constitutional Petition E135 of 2023) [2023] KEELRC 3013 (KLR) (27 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3013 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E135 OF 2023**

B ONGAYA, J

NOVEMBER 27, 2023

**IN THE MATTER OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 2(1),
2(4), 3(1), 10(2), 19, 20(1), 21(1), 22(1), 23(1), 23(3), 47,48, 50(1),
132, 156, 159, 165 AND 259 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS AND ENFORCEMENT OF THE
CONSTITUTION) PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2016

AND

**IN THE MATTER OF REVOCATION AND APPOINTMENT
OF THE OFFICER INCHARGE OF SUPPLY CHAIM
MANAGEMENT OF THE NATIONAL HEALTH INSURANCE
FUND**

BETWEEN

MILKAH NJAMBI PETITIONER



AND

NATIONAL HEALTH INSURANCE FUND RESPONDENT

AND

OSCAR AMWOGA CONTEMNOR

SAMSON KUHORA CONTEMNOR

RULING

1. The Petitioner has filed an application by the notice of motion dated 10.08.2023 through Okubasu & Munene Advocates seeking the following orders:
 - a. That this application be certified urgent and service be dispensed within in the first instance.
 - b. That the 1st contemnor, the Human Resource Manager of the National Health Insurance Fund (NHIF), the respondent, be cited for contempt of court orders issued in the suit herein for maintenance of status quo.
 - c. That the 2nd contemnor, the Chief Executive Officer (CEO) of the NHIF, the respondent, be cited for contempt of court orders issued in the suit herein for maintenance of status quo.
 - d. That the 1st contemnor, the Human Resource Manager of the NHIF, the respondent herein be committed to civil jail for a period of six (6) months or any other period or any other sanction as this honourable court may deem fit and appropriate.
 - e. That the 2nd contemnor, the CEO of the NHIF, the respondent herein, be committed to civil jail for a period of six (6) months or any period or any other sanction as this honourable court may deem fit and appropriate.
 - f. That costs of this application be provided for.
2. The said application is supported by the affidavit of Milkah Njambi and made on the following grounds:
 - a. That conservatory orders were issued on the 27.07.2023 by the Honourable Justice Byram Ongaya suspending the decision made by the respondent on 15.06.2023 of withdrawing the appointment of Mr. Wilberforce Walubengo Wasike as the officer in charge of the supply chain department and demanding to handover and vacate office.
 - b. The said orders were served upon the respondents.
 - c. The petitioner visited the respondents and was informed that the orders had not been implemented.
 - d. The petitioner was informed by Wilberforce Wasike that the order had not been complied with.
 - e. That the actions by the 1st and 2nd Contemnor of blatant disregard of court orders are not only disreputable to the authority, process and sanctity of the court process but also occasioning grave prejudice to the petitioner.
 - f. That it is in the interest of justice that the orders sought herein be granted as prayed.



3. In reply the Respondent filed the Replying affidavit of Oscar Amwoga, the Acting head Human Resource Manager of the respondent, sworn on 20.09.203 and stated thus:
 - a. That via communication to all staff of the respondent dated 15.06.2023, Wilberforce Walubengo Wasike was replaced as Acting Head of Supply Chain Management of the institution.
 - b. That several other officers of the respondent were affected by similar changes that befell the employees in issue, contrary to the allegations that he was discriminated against and treated differently from other employees.
 - c. That by 20.07.2023 when this suit was filed Wilberforce Walubengo Wasike had already moved to his office as Principal Supply Chain Management Officer and started carrying out his duties in that office.
 - d. That even after the orders herein were made by the Honourable Court on 27.07.2023 the said officer voluntarily continued to occupy his office as principal supply chain management officer.
 - e. That due to this the respondent has filed an application dated 22.08.2023 seeking inter alia stay and set aside the said court orders.
4. The respondent as stated in its replying affidavit, filed a notice of motion application dated 22.08.2023 through ENO & Associates Advocates seeking the following orders:
 - a. That the instant application be certified as urgent and the same be heard ex parte in the first instance during the current High Court vacation.
 - b. That there be a temporary stay of execution of the order of this honourable court dated 27.07.2023 pending the hearing and determination of the instant application or further orders of Court.
 - c. That the order of the Honourable Court dated 27.07.2023 be and is hereby set aside.
 - d. That costs of this application be provided for.
5. The said application is supported by the affidavit of Dr Samson Kuhora and made on the following grounds:
 - a. On 20.07.2023 the petitioner filed this suit and inter alia sought that the decision of the applicant herein made on 15.06.2023 to terminate the acting services of its employee Wilberforce W.Wasike as]Head of Supply Chain Department be suspended.
 - b. That the said order was granted ex parte on 27.07.2023.
 - c. The petitioner concealed from the Court the fact that by the date she filed the suit on 20.07.2023 the said office of Head of Supply Chain Department had been lawfully filled by a different officer.
 - d. In the light of the foregoing, the petitioner obtained the impugned orders by misleading and concealing material facts from the court and it is fair and just that the said order be stayed forthwith.
 - e. The petitioner will suffer no prejudice if the said order is stayed as the affected employee was reverted to his previous substantive position of head, principal supply chain management with respondent.



- f. Unless the instant application is heard forthwith during the current vacation and suitable orders made, compliance with the order dated 27.07.2023 will be onerous as a new officer had assumed office by the date the impugned order was made.
6. In reply the Petitioner filed her replying affidavit, sworn on 20.09.2023 and stated thus:
- a. That on 28.07.2023 the respondent was duly served with the court order and had no reason at all to be in disobedience of it.
 - b. That the orders obtained during the hearing of the suit were not ex-parte since the respondent was aware of the hearing of the suit but failed to attend the court proceedings.
 - c. That the respondent has not given any reasons whatsoever as to why they failed to attend the court proceedings which prompted filing of the instant application for the purpose of wasting previous judicial time in delivering speedy and fair trial.
 - d. That the respondent's application was an afterthought, since the petitioner had filed a contempt of court application, following the respondent's continued disobedience of the court orders issued.
 - e. That the respondent is in continued disobedience of the court orders since Wilberforce Walubengo Wasike is yet to be reinstated as the Acting Head of Supply Chain Department.
 - f. The petitioner's notice of motion dated 07.07.2023 was instituted to protect the violation of the Constitution & the relevant laws to secure justice and in good faith hence the orders granted on 27.07.2023 should remain in force pending the determination of the matter.
 - g. That the petitioner's petition will be rendered nugatory if the instant application by the respondent is allowed and orders issued on 27.07.2023 are stayed.
7. The respondent has since filed another application by the notice of motion dated 20.09.2023 seeking the following orders:
- a. That the Honourable Court be pleased to join Wilberforce Walubengo Wasike to these proceedings as interested party.
 - b. That the Honourable Court be pleased to grant leave to the intended interested party to participate and file documents in this matter.
 - c. That the costs of the application be provided for.
8. The application is supported by the affidavit of Oscar Amwoga and made on the following grounds:
- a. That the subject matter of this suit relates to the employment of the intended interested party with the applicant.
 - b. Consequently, the participation of the intended interested party is necessary to enable the court effectively adjudicate on the matter.
 - c. That no party will suffer any prejudice if the intended interested party is joined to this case.
 - d. That it is in the interest of justice that the prayers sought herein are granted.
9. The Petitioner in reply filed the Replying affidavit sworn on 03.11.2023 and stated thus:
- a. That the respondent cannot escape liability for absconding or violating the constitutional rights of the intended interested party by trying to enjoin him in this suit. That the respondent



alleges that the intended interested party is contented with working at the respondent while it continues to defy court orders issued on 27.07.2023 by the honourable court reinstating him to his position as acting head of supply which amounts to violation of his constitutional right.

- b. That the application is actuated by malice as it has not demonstrated what prejudice they are likely to suffer if the intended interested party is not enjoined unless they are culpable of some irregular and/or illegal acts as stated in the petition.
 - c. Under article 258 every person has the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention.
 - d. That the instant application is an abuse of court process and designed to delay the matter which involves constitutional violation of the intended interested party and that the dismissal of the application will not lead to any prejudice as the respondent will not suffer any harm if the intended interested party is not enjoined as joinder of parties is done when a party is necessary to the suit and injustice will occur without them being enjoined.
10. Additionally, the Intended Interested party has since filed a further affidavit sworn on 16.11.2023 and stated thus:
- a. That he is not happy in his current position since this Honourable Court issued orders on 27.07.2023 to have the respondent reinstate him as Acting officer in charge of Supply Chain Department which the respondent is yet to comply.
 - b. That he is aware of this case and fully supports it and it is in his interests.
 - c. That he was unprocedurally removed from office which was against his wish.
 - d. That by the time this instant suit was filed he had not handed over office to anyone and therefore there is no handover forms or documents to that effect that were submitted to the respondent.
 - e. That he was supposed to hold the position until it is substantively filled, and the same is yet to be filled.
 - f. That most heads of department, managers and other officers are in acting capacity whereby some of them have been serving for even more than three years awaiting the positions to be substantively filled.
 - g. That he denies the averment that he is happy in his demoted position.
11. The parties filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows.
12. To answer the 1st issue, the application for joinder dated 20.09.2023 is allowed as there is no dispute that the dispute is about the termination of the acting appointment of the proposed interested party. An order will issue that Wilberforce Walubengo Wasike is enjoined to the petition as an interested party.
13. To answer the 2nd issue, the Court returns that the order by the Court given on 27.07.2023 is amenable to setting aside. In particular, the order had the effect of reverting the interested party to the acting position whereas Oscar Amwoga had already occupied that same position. The order was a conservatory order staying and suspending implementation of the decision dated 15.06.2023 withdrawing the appointment of the interested party as the officer in charge of the Supply Chain Department and demanding him to handover and vacate office. The order appears to have been made in circumstances that it had in fact been overtaken by appointment of Oscar Amwoga on 15.06.2023



to replace the interested party. The Court considers that the unavailability of the position to act in as was ordered had been overtaken by reason of appointment of Oscar Amwoga to act in that position.

14. To answer the 3rd issue, the Court returns that the petitioner's application for contempt will collapse as unjustified. First, the order was directed at the respondent and not Oscar Amwoga or Samson Kuhora who have been named as contemnors. The cited contemnors are officers of the respondent and the petitioner as applicant has not shown how it became their responsibility to comply with the order. In the circumstances, the application is found to have been misconceived.
15. The Court has considered that the respondent failed to enter appearance and to attend the hearing of the initial application resulting in the grant of the orders given on 27.07.2023. The Court has also considered the parties' margins of success. The Court returns that each party to bear own costs of the applications.

In conclusion, the applications dated 10.08.2023, 22.08.2023, and 20.09.2023 are hereby determined with orders:

1. The application dated 10.08.2023 for contempt is hereby dismissed.
2. Wilberforce Walubengo Wasike is enjoined to the petition as an interested party.
3. The order by the Court given on 27.07.2023 is hereby set aside.
4. Each party to bear own costs of the applications.
5. Parties are encouraged to compromise the main petition with a view of recording a consent as may be just.
6. Parties to take steps for directions for expeditious hearing and determination of the main petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 27TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

