



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**

**PETITION NO. E007 OF 2021**

**STEPHEN KIBET MALAKWEN.....PETITIONER**

**VERSUS**

**FRED KIBET OLOIBE.....1<sup>ST</sup> RESPONDENT**

**KENYA SEED COMPANY LTD.....2<sup>ND</sup> RESPONDENT**

**THE BOARD OF KENYA SEED COMPANY.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a motion dated 12<sup>th</sup> February, 2021 filed in the High Court at Eldoret, the petitioner herein sought orders among others that:

a) That this Honourable Court be pleased to grant to the Petitioner stay and/or suspension orders as against the 1<sup>st</sup> Respondent's purported show cause for Gross misconduct issued to the Petitioner vide letters dated 4<sup>th</sup> August, 2020 and 26<sup>th</sup> January, 2021 respectively, the purported reassignment of duties to the acting Head of Human Resource and Administration and the purported reassignment of the Petitioner from the role of Head of Human Resource and Administration and the pending disciplinary hearing against the Petitioner before the Finance, Staff and General Purpose Committee of the 3<sup>rd</sup> Respondent respectively pending the hearing and determination of this application.

b) That this Honourable Court be pleased to grant to the Petitioner stay and/or suspension orders as against the 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent, and or the 3<sup>rd</sup> respondent's action against the Petitioner's employment at the 2<sup>nd</sup> Respondent including but not limited to suspension, compulsory leave, termination and or summary dismissal pending the hearing and determination of this application.

2. The application was filed concurrently with the petition dated the same day. The petition sought a raft of orders among them that:

a) A declaration that the Petitioner remains the duly appointed and functionally, the Head of Human Resource and Administration at the Kenya Seed Company Limited.

b) A declaration that the purported disciplinary action as against the Petitioner originated vide show cause for gross misconduct letters dated 4<sup>th</sup> August, 2020 and 26<sup>th</sup> January, 2020 and the resulting purported disciplinary process therefrom respectively and inconsistent with the Constitution of Kenya, the Employment Act, and by extension the Human Resources Policies & procedure Manual of the Kenya Seed Company Limited and thus void and of no legal effect:

c) An order of Certiorari calling and binging before and into this court, the 1<sup>st</sup> Respondent's decisions vide show cause for gross misconduct letter dated 4<sup>th</sup> August, 2020 and 26<sup>th</sup> January, 2020, appointment on acting capacity – Head of Human Resources and Administration of Mr. Philip Chemwetich vide letter dated 6<sup>th</sup> October, 2020; reassignment of duties memorandum dated 13<sup>th</sup> January, 2021 for the purpose of being quashed;

d) An order of permanent injunction be issued against the respondents, their agents from interfering with the Petitioner's role as Head of Human Resources and Administration at the Kenya Seed Company.

e) An order of prohibition be and is hereby issued restraining the enforcement/implementation of the 1<sup>st</sup> respondent's letters dated 4<sup>th</sup> August, 2020 and 26<sup>th</sup> January, 2020; appointment on acting capacity – Head of Human Resources and Administration of Mr. Philip Chemwetich vide letter dated 6<sup>th</sup> October, 2020; reassignment of duties vide memorandum dated 13<sup>th</sup> January, 2021.

3. Honourable Lady Justice Hellen Omondi entertained the application ex parte after being persuaded that the respondent was duly served but

neither filed appearance nor filed a response to the application.

4. In her ruling delivered on 20<sup>th</sup> April, 2021, the learned Judge issued orders among others that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' actions against the petitioner's employment be restrained, suspension, compulsory leave, termination or summary dismissal process be suspended pending the hearing of the application.

5. The learned Judge thereafter transferred the petition to this Court as the Court properly seized with jurisdiction for hearing and disposal of the Petition.

6. The petitioners counsel Mr. Kurgat contended that despite the fact that the respondents were served with the order of the court made on 20<sup>th</sup> April, 2021 they had refused and or ignored to abide by the Court order.

7. Mr. Kurgat therefore filed a Notice of Motion dated 2<sup>nd</sup> July, 2021 seeking orders among other that:

a) That Fred Kibor Oloibe and Philip Chemwetich, the 1<sup>st</sup> Respondent and the interested party respectively be committed to civil jail for disobedience of the orders of this Court issued on 4<sup>th</sup> of May, 2021, in Petition Number E001 of 2021, now ELRC Petition No. E007 of 2021.

b) That the said 1<sup>st</sup> respondent and the interested party jointly and severally be committed to civil jail for 6 months.

c) That the said contemnors do pay costs of this Committal Application.

8. The application was supported by the affidavit of the petitioner in which he deposed in the main that:

a) That the 1<sup>st</sup> Respondent was served with the court order whose copy is annexed herein and marked as "SKM 1" in person by a certified court process server and also by email and the interested party was served via his email.

b) That am informed by the layers on record herein which information I verily believe to be true that the emails the said respondents in the petition were served on are:

i) [fred.oloibe@kenyaseed.co.ke](mailto:fred.oloibe@kenyaseed.co.ke)

ii) [wilkister.simiyu@kenyaseed.co.ke](mailto:wilkister.simiyu@kenyaseed.co.ke) this is for the company secretary of the 2<sup>nd</sup> Respondent.

c) That the Respondents in the petition were also served by court Process server whose return of service is annexed herein and marked as "SKM 2"

d) That from the time the court order was issued, I have gone back to my office with a view to performing my functions as Head of Human Resource and Administration in the 2<sup>nd</sup> Respondent's employment but the 1<sup>st</sup> Respondent has not allowed any service to be rendered by me as a substantive holder of the Human Resource function in the 2<sup>nd</sup> Respondent's employment, instead he has deliberately bypassed me in favour of the interested party who is an ICT manager, not skilled in Human Resource matters at all.

e) That upon reporting to office on 11<sup>th</sup> May, 2021, the 1<sup>st</sup> respondent attempted to block/prevent my entry to office through a telephone conversation on 12<sup>th</sup> May, 2021 alleging that I had sneaked into office while he knew that I had reported pursuant to the court order.

f) That the 1<sup>st</sup> respondent and the interested party in these proceedings have continuously failed to respect and or recognize that the court order barred the Respondents in general by restraining them from actions against my employment, suspending me, from sending me on compulsory leave, from terminating or effecting any summary dismissal pending the hearing and determination of the petition. In short, they should not interfere with my duties.

g) That upon service of the court order, the interested party continued performing my duties albeit designating himself as ICT Manager so as to be seen as not being contemptuous to the court order, an action that is designed to defeat the course of justice.

h) That the parties named as having acted in contempt of court orders have jointly and severally frustrated exercise of my duties without any regard to the court order.

i) That the interested party herein one Mr. Philip Chemwetich has continued to purport to exercise authority over my docket without any regard to the court order.

j) That the actions of the said interested party are based on the concurrence and knowledge of the 1<sup>st</sup> respondent who is equally guilty of contempt and hence both of them should be committed to civil jail as provided by the law.

k) That the 1<sup>st</sup> respondent, instead of complying with the court orders has now purported to issue instructions to me that I am supported to be deployed to an institution known as Warehouse Receipt System(WRS) as shown by the annexed letter from the 1<sup>st</sup>

Respondent dated 28<sup>th</sup> June, 2021 and marked as “SKM 4” which in essence is tantamount to removing me from my current employment to another institution not related and/or owned by the 2<sup>nd</sup> Respondent or at all, which action is further evidence of complete disregard of the orders of the court exhibited herein.

l) That the deployment letter to the Warehouse Receipt System issued by the 1<sup>st</sup> Respondent is intended to circumvent the implementation of the court order and defeat the cause of justice in addition to contravening the provisions of the Human Resource Policies and Procedure Manual of the 2<sup>nd</sup> Respondent and the Public Service on transfer/deployment, which relevant copies are annexed herein and marked as “SKM 5” and SKM 6” respectively.

9. The respondent in response to the contempt application filed a replying affidavit through one Fred Oloibe in which he stated among others that:

a) That the said Application of 2<sup>nd</sup> July 2021 primarily seeks prayer for orders that:

*“Fred Kibet Oloibe and Philip Chemwetich, the 1<sup>st</sup> Respondent and the interested party respectively be committed to civil jail for disobedience of the orders of this court issued on 4<sup>th</sup> May, 2021 in Petition Number E001 of 2021, now ELDR Petition No. E007 of 2021”*

b) That with respect to the said order

*“The orders sought are granted to the effect that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents actions against the Petitioner’s employment be and are hereby restrained, suspension, compulsory leave, termination or summary dismissal process be and is hereby suspended pending hearing and determination of the Application.” A copy of the said Order has been produced at page 1 of Exhibit “FO1”*

c) That on a preliminary point, I am advised by my advocates which advice I verily believe to be correct that the overmentioned order of 4<sup>th</sup> May, 2021 has either lapsed or is otherwise fatally defective and incurable so as to preclude any question of contempt.

d) That a plain reading of the said order indicates that the same remained in force “pending hearing and determination of the application”

e) That the “application” referenced in the said order was the applicant’s notice of motion dated 12<sup>th</sup> February, 2021 which is none other than the same application which culminated in the said order of 4<sup>th</sup> May, 2021.

f) That the applicant’s said Notice of Motion had two substantive prayers which were

i) That this Honourable court be pleased to grant to the petitioner stay and/or suspension orders as against the 1<sup>st</sup> respondent’s purported show cause for gross misconduct issued to the petitioner vide letters dated 4<sup>th</sup> August, 2020 and 26<sup>th</sup> January, 2021 respectively, the purported reassignment of duties to the acting Head of Human Resource and Administration and the purported reassignment of the petitioner from the role of Head of Human Resource and Administration and the pending disciplinary hearing against the petitioner before the Finance, staff and General Purposes committee of the 3<sup>rd</sup> Respondent respectively pending the hearing and determination of this application.

ii) That the honourable Court be pleased to grant to the petitioner stay and/suspension orders as against the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Respondent and or the 3<sup>rd</sup> Respondent’s action against the Petitioner’s employment at the 2<sup>nd</sup> Respondent including but not limited to suspension, compulsory leave, termination and or summary dismissal pending the hearing and determination of this application. A copy of the said Notice of motion dated 112<sup>th</sup> February, 2021 is at page 2 to 13 of the Exhibit “FO1

g) That as is evident from the above, there were no prayers for any orders given to last beyond the hearing and determination of the said Application, and indeed, none were or could be given.

h) That as is further evident from the fact that on 20<sup>th</sup> April 2021, Hon. H.A. Omondi delivered her ruling with respect to the said Application of 12<sup>th</sup> February, 2021 (a copy which is as pages 14 to 16 of Exhibit “FO1” coupled with the fact that the order was thereafter extracted and issued on 4<sup>th</sup> May, 2021, the said application of 12<sup>th</sup> February 2021 has necessarily already been fully heard and determined.

i) That in the circumstances, any orders remaining in force “pending the hearing and determination of the application” lapsed the moment the application was heard and determined and neither I nor the interested party can reasonably be accused of being in contempt of non-existent orders.

j) That even if one were to posit that the said orders had not lapsed (which they have), neither I nor the interested party could be accused of being in contempt of the same for the reasons set out in the ensuing paragraphs 15 to 50 below.

k) That the applicant is currently employed as the Head of Human Resources and Administration of the 2<sup>nd</sup> Respondent for a term of 3 years running from 23<sup>rd</sup> October 2019 to 22<sup>nd</sup> October, 2022.

l) That sometime in October, 2020, the Applicant was on compulsory leave pending a hearing before the Finance, staff and General Purpose Committee of the 2<sup>nd</sup> Respondent to answer allegations for gross Misconduct.

m) That with the applicant being on compulsory leave as aforesaid, the Human Resources Department was without a head and in my capacity as Acting Manager Managing Director of the 2<sup>nd</sup> Respondent, I appointed one Philip Chemwetich (the interested Party) as the Acting Head of Human Resource and Administration for a period of 3 months, pending the conclusion of the applicant's said disciplinary process. A copy of the letter of appointment appointing the interested Party as aforesaid is at pages 17 to 18 of Exhibit "FO1"

n) That on 13<sup>th</sup> January, 2021, the Applicant's disciplinary process having not been concluded, the interested Party was retained in his position as the Acting Head of Human Resources and Administration. A copy of the letter of retention sent to the interested party is at page 19 of the Exhibit "FO1"

o) That it has neither been argued nor shown, that as the Acting Managing Director of the 2<sup>nd</sup> Respondent, it was in any way unlawful for me to appoint the interested party as the Acting Head of Human Resources and Administration.

10. From the record only Mr. Kurgat for the applicant/ petitioner seemed to have filed submissions.

11. In urging the grant of the orders sought, Mr. Kurgat submitted *inter alia* that the disobedience of the Court Order by the 1<sup>st</sup> respondent and the interested party had not only an effect of subjecting the petitioner's right to prejudice but also dragging the esteemed image of the Court into disrepute.

12. The terms of the Court Order were clear and unequivocal. The order was to be in force until the applicant's petition was heard and determined. According to counsel the Court Registry typed the order erroneously and the inadvertent error of the Registry should not be visited upon the applicant. The contemnors cannot use the error as a scapegoat to escape the punishment for contempt of Court.

13. Mr. Kurgat further submitted that section 5 of the Judicature Act provided for the power of the court to punish for contempt. The purpose of the power as per the Act, is to uphold the authority and dignity of the Court.

14. According to Mr. Kurgat the 1<sup>st</sup> Respondent and the interested Party were fully aware of the existence of the Court order, the same having been served on them by the court process server on 10<sup>th</sup> May, 2021 and have continued to blatantly disregard the same.

15. On the authority of the Court punish for contempt, counsel drew the attention of the Court to the case of **M. N. Mweru & others -v- National Land Commission & 2 others [2020] eKLR** in which Mativo J. stated

**"... A court without contempt power is not a Court. The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that cannot secure compliance with its own judgments and orders is a contradiction in terms, an oxymoron."**

16. Mr. Kurgat further submitted that the 1<sup>st</sup> respondent and interested party filed a replying affidavit in response to the application out of time in disobedience of the Court directive. The replying affidavit according to counsel ought therefore to be struck out. In the alternative and without prejudice the replying affidavit did not answer to the contempt application as prayed. According to counsel the 1<sup>st</sup> respondent and interested party were not forthright in saying that the orders issued on 4<sup>th</sup> May, 2021 had lapsed.

17. Further the 1<sup>st</sup> respondent had willfully gone ahead and illegally interfered with the petitioner's contract without any justification.

18. Contempt proceedings are quasi criminal in nature. They are intended to protect the authority, image and respect for the Court. Our judicial system is the bulwark of democracy, justice and good governance. It is intended for the protection of those who abide by the law and seek to resolve their disputes through Courts. The jurisdiction to punish for contempt as noted by my brother Mativo J. in the case of M.N. Mweru referred to earlier, is therefore inherent in the Court and that have a Court with no power to punish for contempt is an oxymoron, a contradiction in terms, so to say.

19. Being a quasi criminal jurisdiction the Court must proceed with caution in the exercise of this power since it might entail the loss of liberty or property by a citizen.

20. Before the Court can punish for contempt, it has to be satisfied that its order was clear and unambiguous, the person it was directed to was made aware of it and granted time to comply. It is when these parameters are met and the alleged contemnor persists in the disobedience, that the Court will proceed and stamp its authority by punishing for contempt.

21. The application dated 12<sup>th</sup> February, 2021 sought order among others that:

a) That this Honourable Court be pleased to grant to the Petitioner stay and/or suspension orders as against the 1<sup>st</sup> Respondent's purported show cause for Gross misconduct issued to the Petitioner vide letters dated 4<sup>th</sup> August, 2020 and 26<sup>th</sup> January, 2021 respectively, the purported reassignment of duties to the acting Head of Human Resource and Administration and the purported reassignment of the Petitioner from the role of Head of Human Resource and Administration and the pending disciplinary hearing against the Petitioner before the Finance, Staff and General Purpose Committee of the 3<sup>rd</sup> Respondent respectively pending the

hearing and determination of this application.

b) That this Honourable Court be pleased to grant to the Petitioner stay and/or suspension orders as against the 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent, and or the 3<sup>rd</sup> respondent's action against the Petitioner's employment at the 2<sup>nd</sup> Respondent including but not limited to suspension, compulsory leave, termination and or summary dismissal pending the hearing and determination of this application.

22. The orders as sought is can be seen from the face of it were if granted to last pending the hearing and determination of the application. There was no prayer for the orders to last pending the hearing and determination of the petition.

23. Lady Justice Hellen Omondi who entertained the application on the return date for inter partes hearing but in the absence of the respondent who never filed any response to the same, granted the orders sought in the following terms:

**“... The orders sought are granted to the effect that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' actions against the petitioners' employment be and are hereby restrained suspension, compulsory leave, termination or summary dismissal process be and is hereby suspended pending hearing and determination of this application” (underlining supplied)**

24. On 22<sup>nd</sup> February, 2021 when the application was brought under certificate of urgency, Kimani J. certified the same urgent and ordered the same served for inter partes hearing on 10<sup>th</sup> March, 2021.

25. On 24<sup>th</sup> March, 2021 the matter came up before Lady Justice Hellen Omondi who upon being satisfied that the respondent was duly served proceeded to hear the same ex parte and reserved her ruling for 18<sup>th</sup> April, 2021. The ruling from the record, was delivered on 20<sup>th</sup> April, 2021 with a subsequent direction that the matter be referred to this Court as the Court properly seized with jurisdiction.

26. Taking into consideration the foregoing it would seem that there was an error apparent on the face of the record right from the drafting of the application dated 12<sup>th</sup> February, 2021 to the point when Lady Justice Hellen Omondi delivered her ruling on 20<sup>th</sup> April, 2021.

27. The applicant's Counsel never, as would be expected, sought that the order remains in force pending the hearing and determination of the petition. It is strange coincidence that neither Mr. Kurgat for the petitioner/applicants nor the learned Judge detected the anomaly in the way the orders sought in the application were drafted. Once the learned Judge disposed of the application in here ruling of 20<sup>th</sup> April, 2021 there was no applications left to be heard for which the orders issued in her ruling would abide the outcome thereof. What remained to be determined was the petition.

28. The Court Registry extracted the order in the exact manner they were sought in the application and as granted by Lady Justice Omondi. It is therefore not correct that the error emanated from the registry as argued by Mr. Kurgat for the applicant.

29. Whereas one can reasonably assume that the order ought to have been referring to the hearing and determination of this petition, a court order cannot crystallise on assumption and especially where there is an allegation of disobedience of the order and contempt of court application contemplated. Whereas Mr. Kurgat contended that he brought the alleged error to the attention of the Court Registry he made no efforts to scrutinize the order to ensure it complied with the prayers as sought in the application and as granted by Lady Justice Omondi. If he did so, he could have readily noticed the anomaly and moved the court appropriately for rectification of the error.

30. To this extent the Court is reluctant to premise a declaration of contempt of Court on a flawed Court order. The application is in that regard, disallowed.

31. One issue that the Court on its own motion would venture to address is the issue of the jurisdiction of the High Court to entertain this matter and issue orders before transferring the same to this Court.

32. Under article 162(1) of the constitution the superior Courts are stated as the Supreme Court, the Court of Appeal, the High Court and Courts mentioned under clause(2) of article 162.

33. The Courts mentioned under clause 2 are Employment and Labour Relations Court and Environment and Land Court.

34. Article 162(2) gave Parliament power to establish the two equal status court to determine disputes relating to employment and labour relations in the case of ELRC and Environment and the use and occupation of the title to land in the case of ELC. Further under article 165(5) the High Court is deprived of jurisdiction over matters reserved for Employment and Labour Relations Court and Environment and Land Court as established under article 162(2).

35. In the now famous case of **Owners of Motor Vessel “Lillian s” -V- Caltex Oil (Kenya) Ltd**, Nyarangi J.A. stated as follows:

**“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tool in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.**

36. The Court of Appeal sitting in Nyeri in the case of **Joseph Muthee Kamau & Another -v- David Mwangi Gathure and Another [2013] eKLR** stated that:

**“ When a suit has been filed in a Court without jurisdiction, it is a nullity.”**

37. The supreme Court further in the case of Samuel Kamau Macharia -v- KCB & 2 Others Civil Application No. 2 of 2011 also stated that:

**“ A Court’s jurisdiction flows from either the constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”**

38. This matter from the onset was a matter within the exclusive jurisdiction of this Court. The High Court lacked jurisdiction to entertain the same and the two learned Judges of the High Court who handled the matter needed no prompting to notice that it was a matter within the exclusive jurisdiction of the Employment and Labour Relations Court.

39. The Court further fails to understand the logic by Counsel for the petitioners who is a fairly Senior member of the Bar, filing this matter before a Court he knew or ought to have known lacked jurisdiction to entertain the same.

40. The logical conclusion from the above decision would have been to declare the present suit and consequential orders a nullity however judicial restrained and order dictates otherwise.

41. The House of Lords in the case of Isaacs -v- Robertson [1984] 3 All ER 140 per Lord Diplock observed.

**“It is plain and unqualified obligation of every person against or in respect of whom an order is made by Court of competent jurisdiction to obey it unless and until that order is discharged. Uncompromising notice 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.”**

42. In conclusion and arising from what the Court has observed above, the application dated 2<sup>nd</sup> July, 2021 seeking to cite the respondents for contempt of Court is hereby disallowed with no order as to costs.

43. **It is so ordered.**

**DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF MARCH, 2022**

**Abuodha Nelson Jorum**

**Judge ELRC**