



Republic v Chairman, Board of Directors National Water Harvesting and Storage Authority & another; Kairu (Exparte Applicant); Obonyo (Interested Party) (Judicial Review E005 of 2021) [2022] KEELRC 4107 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 4107 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
JUDICIAL REVIEW E005 OF 2021
DN NDERITU, J
SEPTEMBER 22, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

CHAIRMAN, BOARD OF DIRECTORS NATIONAL WATER HARVESTING AND STORAGE AUTHORITY 1ST RESPONDENT

BOARD OF DIRECTORS NATIONAL WATER HARVESTING AND STORAGE AUTHORITY 2ND RESPONDENT

AND

DAVID NGURE KAIRU EXPARTE APPLICANT

AND

SHARON OBONYO INTERESTED PARTY

RULING

I. Introduction

1. In a notice of motion dated May 28, 2021 the *ex-parte* applicant, (applicant), David Ngure Kairu, prays for the following orders:-
 1. Spent
 2. That pending the hearing and determination of the substantive motion, there be a conservatory order prohibiting Sharon Obonyo the interested party from occupying the office of the Chief Executive Officer and/or transact any business of the Authority in the capacity



of an accounting officer until a new full board meeting is convened to appoint a new acting Chief Executive Officer.

3. That pending the hearing and determination of the substantive motion, there be a stay of implementation of board's resolution of May 27, 2021 extending the term of interested party as the acting Chief Executive Officer of National Water Harvesting and Storage Authority.
 4. That notice to show cause do issue to Sharon Obonyo, Abdullahi Jaldesa Banticha, Samuel Alima, Elema Huka Isaak, Walubengo Waningilo, Jane Mwikali, Monica Cherutich, Geoffrey Gitau and Benard Okebe to show cause why they should not be committed to civil jail and ordered to pay sum of monies as penalty for being in contempt of court orders given on May 25, 2021.
 5. That this honourable court be pleased to issue a declaration that Sharon Obonyo, Abdulahi Jaldesa Banticha, Samuel Alima, Elema Huka Issak, Walubengo Waningilo, Jane Mwikali, Monica Cherutich, Goffrey Gituau and Benard Okebe are in contempt of court orders given on May 25, 2021.
 6. That this honourable court be pleased to order that Sharon Obonyo, Abdullahi Jaldesa Banticha, Samuel Alima, Elema Huka Isaac, Walubengo Waningilo, Jane Mwikali, Monica Cherutich, Geoffrey Gitau and Benard Okebe be arrested and committed to civil jail for a period the court may determine and be ordered to personally pay the sum of monies the court may determine as a penalty for deliberately defying and violating the clear, concise and unequivocal orders of this honourable court given on May 25, 2021.
 7. That the costs of this application be awarded to the *ex-parte* applicant.
2. The said application is based on the grounds stated on the face of it and supported by the affidavit of the applicant sworn on even date with several annexures thereto.
 3. In response to the application the interested party, Sharon Obonyo, filed a replying affidavit sworn on June 24, 2021 with annexures thereto.
 4. Although this court had on November 17, 2021 directed that the application be heard orally in court, when all the parties and their counsel appeared in court on the said date counsel agreed that the same be disposed of by way of written submission to save on time.
 5. The applicant's counsel filed written submissions on March 29, 2022 while the 2nd respondent's counsel also acting for the interested party filed on December 7, 2021. Counsel for the parties also filed list and copies of authorities relied upon.

II. Background

6. On May 25, 2021 the Court (Wasilwa J) issued an ex-parte order in the following terms:-
 1. That in the absence of the respondents though served, the leave sought do operate as a stay of implementation of the entire resolutions of the 3rd special full Board of Directors of the National Water Harvesting and Storage Authority meeting held on April 28, 2021 together with extension letter of appointment and acting Chief Executive Officer of the interested party dated April 28, 2021 pending the hearing of the application.
 2. That application be filed in 14 days.
7. It is this order that the applicant alleges that members of the 2nd respondent and the interested party have breached and hence seeking the orders set out above.



III. Ex-parte Applicant's Case

8. As set out in the materials placed before court, the applicant states that on May 25, 2021 the Court (Wasilwa J) issued the orders set out above and that the said orders have not been varied and or set aside.
9. In paragraph 4 of the supporting affidavit the applicant asserts that the orders issued by court on May 25, 2021 were served upon all the parties, and specifically the members of the 2nd respondent and the interested party. And purportedly to confirm the said service the applicant has annexed a copy of affidavit of service by one Tom Kayere, a court process server, sworn on May 20, 2021.
10. In the said affidavit of service the deponent states that he received the said court order and the other court process from the applicant's counsel on May 12, 2021 at 12.00noon and that on the same date he effected service upon the 1st and 2nd respondents and upon the interested party through their respective secretaries.
11. The copy of the order returned to court with the affidavit of service bears an incomplete rubber stamp on the face of it indicating "chairman received 26 May 2021" on the legible part. It bears no signature or the name of the person who was allegedly served or received the same.
12. This court has deliberately underlined and highlighted the dates appearing in the foregoing paragraphs as they are important and relevant in aiding this court to arrive at a fair and just conclusion of this application.
13. If the order of the court was issued on May 25, 2021 there is no way that the same would have been availed to the process server on May 12, 2021 as the same did not exist. There is also no way that the process server would have served the said order on May 12, 2021 as the process server alleges in the affidavit of service. The situation is even more complicated by the rubber stamping on the face of the said order which indicates that the order was allegedly received by the 1st respondent on May 26, 2021.
14. From the foregoing, the only reasonable and logical conclusion for this court to draw is that the affidavit of service filed in court and the alleged service of the order by the said process server is falsehoods.
15. The applicant avers that on May 27, 2021 the interested party sent out an invitation of the 4th special full board meeting of the 2nd respondent to be held on the same date to discuss the status of the vacant position of the Chief Executive Officer (CEO). According to the applicant the members of the 2nd respondent conducted the business of the 4th special full board meeting as invited by the interested party, and that during the said meeting the interested party was appointed to act as the CEO for a further six (6) months from that date. It is the applicant's argument that the members of the 2nd respondent and the interested party acted in blatant and flagrant violation and abuse of the orders of the court alluded to earlier on above.

IV. Respondents' And Interested Party's Case

16. There is no replying affidavit (s) on record from the 1st and 2nd respondents. However, there is a replying affidavit from the interested party sworn on June 24, 2021.
17. In paragraph 3 of the said replying affidavit the interested party deposes that herself and members of the 2nd respondent were not aware of the court order of May 25, 2021. She deposes that she learnt of the existence of the said order in the evening of May 27, 2021 after the meeting above had been held and concluded. And even then, she learnt of the same from the social media.



18. The interested party avers that she had not been served with the court order and did not know of its existence and hence she should not be found to have disobeyed or breached a court order that she did not know existed in the first place. She avers that the said court order was issued ex-parte and hence she had no knowledge of the same and she could not logically and reasonably be expected to have been aware of the same.
19. It is on the basis of the foregoing background that counsel for the parties filed their written submissions as alluded to earlier on above.

IV. Ex-parte Applicant's Submissions

20. EK Koskei & Co Advocates filed a list of authorities and copies of the said authorities on November 30, 2021 and followed the same with written submissions filed on March 29, 2022.
21. According to Mr Koskei, the issues for determination by this court are to be based on the prayers in the Notice of motion dated May 28, 2021. Counsel submitted that members of the 2nd respondent and the interested party were served with the court order of May 24, 2021 but they refused to comply. He argues that having been served the members of 2nd respondent and the interested party were aware and had knowledge of the orders.
22. Counsel relied on several authorities that were filed as aforesaid and stated that based on the affidavit of service by Tom Kayere there is evidence that the concerned parties were served with the said order and that they had knowledge of its import. He relied on section 4(1)(a) of the *Contempt of Court Act* on definition of contempt of court which includes civil contempt.
23. Counsel relied on *Teachers Service Commission v Kenya Union of Teachers & 2 others* (2013) which cited *Johnson v Grant* (1923) SC 789 to illustrate that contempt of court is antithesis to rule of law and order. Further, counsel relied on *Kenya Tea Growers Association v Francis Atwoli & 5 others* (2012) eKLR and *Econet Wireless Ltd v Minister for Information & Communication of Kenya & another* (2005) to affirm that court orders must be obeyed even when parties do not agree with them.
24. Counsel identified the following as the ingredients of contempt of court drawing from the book *Contempt in Modern Newzealand*:-
 - (a) The terms of the orders (or injunctions or undertaking) were clear and unambiguous and were binding on the defendant
 - (b) The defendant had knowledge of or proper notice of the terms of the order
 - (c) The defendant has acted in breach of the terms of the order.
 - (d) The defendant's conduct was deliberate.
25. In affirming the powers of all superior courts to punish for contempt, counsel cited the Supreme Court in *Board of Governors, Moi High School Kabarak v Malcom Bell* (2013) eKLR and the Court of Appeal in *Akber Abdullah Kassam Esmail v Equip Agencies Ltd & 4 others* (2014) eKLR, along with section 5 of the *Contempt of Court Act*.
26. On how the concerned parties violated the court order, counsel submitted that the meeting called by the interested party on May 27, 2021 was intended to defeat the order of the court and that the same was in bad taste and in contempt of the court order. Counsel submitted that the violation of the court order was blatant, deliberate, and intentional. He relied on several decisions in demonstrating why it



is germane that court orders be obeyed by all and sundry. He cited *Hadkinson v Hadkinson* (1952) 2 All ER 567 among others decisions.

27. Counsel concluded by urging this court to stamp its authority and punish members of the 2nd respondent and the interested party for the purported contempt of court.

VI. Submissions For 2nd Respondent And The Interested Party

28. Muchemi & Co Advocates filed submissions dated December 1, 2021 for the 2nd respondent and the interested party wherein they identified only one issue for determination by this court, and that is whether members of the 2nd respondent and the interested party flagrantly and wilfully defied the court order of May 25, 2021.
29. Counsel submitted that it is clear, through the replying affidavit of the interested party, that members of the 2nd respondent and the interested party were neither served nor aware of the court order of May 25, 2021. Counsel relied on *Katsari Limited v Kapurchand Depar Shah* (2016) eKLR wherein the court quoted the aforementioned book (*Contempt in Modern Newzealand*) on the elements of contempt of court. This material is equally relied upon by counsel for the applicant as analysed in an earlier part of this ruling.
30. Counsel submitted that the court order of May 25, 2021 was issued ex-parte and that the same was not served upon members of the 2nd respondent and the interested party counsel has further submitted that there is no evidence that the said parties were aware of the said court orders as of May 27, 2021 when the interested party called for the 4th full board meeting of May 27, 2021.
31. Counsel submitted that the parties cited are not in contempt of the order of the court and that no evidence has been adduced to demonstrate such violation as the members of the 2nd respondent and the interested party never implemented the resolutions of the 3rd special full board meeting held on April 28, 2021 together with the extension letter of appointment of acting CEO dated April 28, 2021.
32. On the basis of the foregoing, counsel prayed that the application for contempt of court against members of the 2nd respondent and the interested party be dismissed with costs.

VII. Issues For Determination

33. In this court's view there is only one issue for determination in this application, and the issue is:-
- (a) Are the members of the 2nd respondent as named in the application together with the interested party in contempt of the order issued by court on May 25, 2021?
 - (b) Costs.
34. As noted in the introductory part of this ruling, the notice of motion dated May 28, 2021 has several prayers in it. However, parties and their respective counsel have mainly dealt with the prayer on contempt of court in their pleadings and submissions. In the circumstances, this court shall deal with the issue of contempt of the court order before commenting on the other prayers.
35. In part III of this ruling above, this court dealt with the issue of service of the order of court issued on May 25, 2021 and came to the inescapable conclusion that the said order was not served upon members of the 2nd respondent and the interested party. It is the view of this court that the affidavit of service filed by the process server is false for reasons stated in that part of the ruling.
36. This court is in agreement with both counsel on the elements/ingredients of contempt of a court order as stated elsewhere in this ruling. The applicant has to demonstrate that:-



- i. There is a valid court order that is unambiguous and clear.
 - ii. That the order has been served (notice) upon the respondent(s) and or that the respondent (s) is aware and has knowledge of the order.
 - iii. That the respondent(s) and the interested party have breached the said court order.
 - iv. That the said breach or violation is willful and deliberate.
37. The standard of proof in contempt of court proceedings, which are quasi-criminal, is beyond balance of probability but below beyond reasonable doubts. In regard to element (i) above, there is no argument that there exists a lawful court order that was issued by court on May 25, 2021 in terms set out in an earlier part of this ruling. There is also no dispute that the said order was issued *ex-parte*. The terms of the said order are clear and unambiguous. The parties and their respective counsel are in agreement and hence this ingredient (i) is in the affirmative.
38. In regard to ingredient (ii), this court has already found that members of the 2nd respondent and the interested party were not served with the said order as required in law. The affidavit of service filed has been found to be false. The applicant has not in any way demonstrated that members of the 2nd respondent and the interested party were aware of or had knowledge of the said court order and or the contents thereof. In regard to this ingredient, this court holds that the applicant has failed to prove this element.
39. Ingredient (iii) is about breach of the order. Without splitting hairs, this court holds that if members of the 2nd respondent and the interested party were not aware and had no knowledge of the said court order, it is neither logical nor reasonable to hold that they breached the same. Moreover, without proper service or knowledge of the said court order there is no way to hold that they wilfully or otherwise breached the same. This argument holds in respect of ingredient (iv) as well.
40. The net effect of the foregoing is that this court cannot logically, reasonably, and legally find members of the 2nd respondent and the interested party in contempt of court and to this extent the application is thus dismissed. The parties and counsel did not comment or submit on the other prayers in the application and this court makes the findings on the same.

VIII. Costs

41. This court orders the costs in this application be in the cause as there are many more issues, including applications, that need to be heard and determined before the main cause is disposed of.

IX. Directions

42. This court is aware, as it was so informed on December 7, 2021 that members of the 2nd respondent named in the application were to leave office early this year (2022). The court is not aware if new members have been appointed to the 2nd respondent and also whether a substantive CEO has been appointed. Earlier on in these proceedings there was an indication from counsel for the parties that they intended to attempt an out of court settlement.
43. In the circumstances, this court directs that within 30 days of this ruling parties and their respective counsel do appear in court for directions on the way forward taking into account the current status of each of the parties and the applications still pending in this matter.



44. Last but not least, the court thanks the counsel for the parties for the effort and industry so far demonstrated in handling this matter. May the same efforts be directed, as much as possible, towards an amicable resolution of the main matter and all the pending applications.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2022.

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DAVID NDERITU

JUDGE

