



**Gituma v PZ Cussons PLC (Petition E178 of 2021)  
[2022] KEELRC 13281 (KLR) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13281 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E178 OF 2021  
K OCHARO, J  
NOVEMBER 25, 2022**

**BETWEEN**

**JANE WANJIKU GITUMA ..... PETITIONER**

**AND**

**PZ CUSSONS PLC ..... RESPONDENT**

**RULING**

1. Through a petition herein dated November 15, 2021, the Petitioner sought against the Respondent the following orders and reliefs:
  - a. A declaration that the termination of the claimant by the Respondent on grounds of redundancy is null and void.
  - b. Reinstatement or in the alternative;
  - c. 2 months' pay in lieu of notice;
  - d. Damages and or compensation under section 49 of the *Employment Act* for unfair termination.
  - e. Outstanding leave days;
  - f. Severance pay at 25 days' pay each year worked for 5 years.
2. Contemporaneously with the filing of the petition, the Petitioner filed a Notice of Motion Application dated November 15, 2021 wherein she sought:
  - a. That the Application and Petition filed herewith be certified as urgent and set for hearing on priority basis and *ex parte* in the first instance.
  - b. That pending the hearing and determination of this Application, the Honourable Court be pleased to issue interim orders for stay/or stop the operation and effect of the



Respondent's letter dated October 14, 2021 giving notice to terminate the Petitioner/Applicant's employment with itself on account of redundancy.

- c. That pending the hearing and determination of this application, this Honourable Court be and is hereby pleased to issue an order to prohibit the Respondent from declaring the Petitioner/Applicant redundant.
  - d. That pending the hearing and determination of the main suit herein this Honourable Court be and is hereby pleased to issue an order to prohibit the Respondent from declaring the Petitioner/Applicant redundant.
  - e. That pending the hearing and determination of this application this Honourable Court be pleased to order the Respondent to maintain the Applicant in the Respondent's payroll.
  - f. Any other relief that this court may grant in the interest of justice.
  - g. Costs be in the cause.
3. The application was placed before Justice Maureen Onyango on November 17, 2021, under certificate of urgency, when she issued the following order:
- “ 1. Application dated November 15, 2021 is hereby certified urgent and fixed for hearing *inter partes* on December 9, 2021.
  2. In the meantime there shall be a temporary suspension of the notice period pending the inter partes hearing.
  3. The Applicant to serve the Respondent.”
4. Before the aforesaid inter partes hearing date, the Respondent filed an application dated December 2, 2021, wherein the following orders were sought:
- i. This application be certified urgent and be heard in priority over the Petitioner's application dated November 15, 2021.
  - ii. This Honourable court do set aside the *ex parte* interim order of November 17, 2021 in its entirety.
  - iii. The Petition filed herein be struck out.
  - iv. This Honourable court be pleased to grant any other orders that are just and fair in the circumstances of this case.
  - v. The costs of this application and of the suit be borne by the Petitioner on a full indemnity basis.
5. The application was placed before court on December 7, 2021 for orders, the court declined to certify it as urgent, and directed that the same be served for hearing on a date that was to be allocated by the registry.
6. Prior to the above-mentioned application, the Petitioner had filed another application dated November 29, 2021, with prayers:
- i. That this instant application be certified as urgent and the same be heard *ex parte* in the first hearing.



- ii. That this Honourable Court be pleased to make a factual finding that the Respondent herein through its General Manager and Human Resource manager are in contempt of the orders of this court dated November 17, 2021.
  - iii. That the General Manager and Human Resource Manager of the Respondent be summoned to appear in person before this Honourable court to show cause why they should not be cited for contempt and committed to civil jail for a period of 6 months or such period and time that this Honourable Court may deem fit and just for wilfully disobeying the lawful orders of this Honourable Court dated November 17, 2021.
  - iv. That the Respondent do pay the costs of this Application.
  - v. That the court do make such orders or further orders as it may deem fair, just and in the interest of justice.
7. Faced with the multiple applications, this court had to give directions on how they could be proceeded with. On November 9, 2021, the court directed that the application dated November 29, 2021 be heard first. The affidavit in support of the Respondent's application dated December 2, 2021, sworn by one Karimi Kiogora, was deemed the replying affidavit.
  8. The court directed that the application be canvassed by way of written submissions, directions which have since been obliged.

#### **The Petitioner's / Applicant's Application**

9. The Application is anchored on the grounds obtaining on the face of the application, and those in the affidavit sworn by the Petitioner/Applicant on November 29, 2021.
10. The Applicant contended that on November 17, 2021, this court gave an order effectively allowing her to go back to work as the orders impeded the redundancy notice that had been issued by the Respondent.
11. It was further asserted that the order was served upon the Respondent, and that the Respondent through its General Manager and Human Resource Manager have disobeyed the order.
12. On strength of the order, she reported back to work on November 22, 2021, but was not allowed to access her work station as the security officers under instructions from the General Manager and Human Resource Manager denied her the access.
13. The Petitioner/Applicant asserts that according to the Respondent, she could not be allowed access to the premises of the latter as she had integrity issues. The reason was not the subject matter of the termination of her employment.
14. The Respondent's agents locked her from the payroll.
15. The Respondent is without any justifiable cause in flagrant and deliberate disobedience of the court's order and this court should reign in on them and punish the contempt.
16. It is argued that unless the orders sought are granted the authority of this court shall be, and continue to be, undermined.



## The Respondent's Response

17. The Respondent stated that the Petitioner/Applicant filed the petition herein on November 17, 2021, contemporaneously with the Notice of Motion application dated November 15, 2021, application upon which the order said to have been disobeyed by the Respondent's agents was issued.
18. The petition herein challenges the termination of her employment on account of redundancy, and the application sought for an injunctive relief, to stop the effect of redundancy notice that had been issued to the Petitioner.
19. According to the Respondent, the Notice of intention to declare redundancy was issued on October 14, 2021 and it ran for a period of 30 days which lapsed on November 14, 2021. After the lapse of the notice period, the Petitioner's employment was terminated by a letter dated November 15, 2021.
20. The Petitioner/Applicant was paid her redundancy dues fully, and was no longer an employee of the Respondent by the time of the filing the petition and the application, and, the grant of the interim orders. As such the order of November 17, 2021 was incapable of enforcement as it had been overtaken by events.
21. The Respondent contends that the Petitioner/Applicant failed to disclose material facts to the court that the redundancy notice period had lapsed and her employment terminated, when she moved to court to obtain the orders of November 17, 2021.
22. After being paid her terminal dues of Kshs 6,392,765.00 less the necessary deductions. The Petitioner cleared with the Respondent on November 24, 2021.

## The Applicant's Submissions

23. The Applicant proposes a single issue for determination in the instant application, whether the Respondent through its General Manager and Human Resource Manager are in contempt of the orders of this Honourable Court dated November 17, 2021.
24. Counsel for the Applicant submitted that contempt of court is that conduct or inaction that defies or disrespects authority of court. In support of this point he cites, the definition accorded by *Black's Law Dictionary* 9<sup>th</sup> Edition thus:

“The act or state of despising; the conduct of being despising. Conduct that defies authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.”
25. Citing *Halsbury's Laws of England*, counsel submitted that it is the plain and unqualified obligation of every person or in respect of whom an order was made by court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would be as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment.
26. It was submitted that courts punish for contempt with the purpose to uphold their dignity and authority, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial administration of justice, and maintain public confidence in the administration of justice, by courts. To buttress this submission, reliance was placed in the holding



in *Econet Wireless Kenya Limited v. Minister for Information & Communications & another* [2005] KLR 828, thus:

“It is essential for the maintenance of the rule of law and order that the authority and dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of the orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of the obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.”

27. In order for a person to be punished for contempt, it must be proved that the order was served and the person cited for contempt had personal knowledge of the order in issue. It was further submitted that Crowell J., in the case of *Carey v Laiken*, 2015 SCC 17 [April 16, 2015] expounded on the three elements of civil contempt of court, thus:
- i. The order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about, where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
  - ii. The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on basis of the wilful blindness doctrine.
  - iii. The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.
28. The petition herein was filed on November 15, 2021, contemporaneously with the Notice of motion application that sought to suspend the redundancy notice. The court gave an order suspending the notice on November 17, 2021. The Respondent’s principal officers were served, service which prompted them to enter appearance through counsel. There is no doubt therefore that the 1<sup>st</sup> limb is satisfied, it was further submitted.
29. It is clear that suspension of the redundancy notice meant that the Applicant was to be allowed to work, a thing that she was not accorded. The Applicant was locked out of the premises of the Respondent, this all indicative that the Respondent was aware of the terms of the order.
30. Having not allowed the Applicant to get back to work as contemplated in the order, the Respondent was in a clear breach of the order. The contempt must be punished for.

### **The Respondent’s Submissions**

31. The Respondent identified the following issues for determination:
- a. Whether the Respondent’s officers are guilty of contempt of the order dated November 17, 2021;
  - b. Whether the court orders dated November 17, 2021 entitled the Petitioner to reinstatement;
  - c. Whether the Petitioner/Applicant is entitled to the orders sought.



32. Counsel for the Respondent submitted that in the case of A D C V D P N [2017] eKLR, the court did bring forth that salient elements requisite in prove of contempt of court. The court cited with approval the holding in the Scottish case of Steward Robertson v Her Majesty's Advocate, [2007] HCAC 63, thus:

“Contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the Court order or that wilfully challenges or affronts the authority of the court and supremacy of the law, whether in civil or criminal proceedings.”

33. The Court of Appeal in *Michael Sistu Mwaura Kamau v Director of Public Prosecutions & 4 Others* [2018] eKLR.

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has wilfully and deliberately disobeyed a court order that he was aware of. That is absolutely clear by section 4 of the *contempt of Court Act* and ruling of the Supreme Court in REPUBLIC -V- AHMAD ABOLFALHI MOHAMMED & ANOTHER [supra]. Secondly, as this Court emphasized in JIHAN FREIGHTERS LIMITED -V- HARDWARE & GENERAL STORES LIMITED, and in A.B. & ANOTHER -V- R.B. [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt.”

34. It was submitted that the Respondent became aware of the Court order of November 17, 2021 when it was served on November 19, 2021. Knowledge alone however is not the only ingredient considerable in contempt proceedings. This court is enjoined to consider the import of the subject order in order to render itself on the application justly.

35. The Respondent issued the notice of intended termination of employment dated October 14, 2021 under section 40 [1] [b] which notice ran until October 14, 2021.

36. It was argued that it is clear that the orders of November 17, 2021, were issued in the context that there was a redundancy notice that was running and that the Applicant had sought to stop. The order that was issued was directed to stop that notice. The Petitioner failed to disclose to the court that a termination letter had already been issued on November 15, 2022 effectively terminating her employment.

37. The long and short of it therefore being that the order of November 17, 2021 had already been overtaken by events. Whatever was sought to be suspended had already taken place. Consequently, the order was incapable of being enforced. Courts will not issue an order that is incapable of being enforced. Reliance was placed on the case of Anita Chelagat O’ Donovan & 2 Others v Fredrick Kwame Kumah & 2 Others [2015] eKLR, where the court held:

“Further, it has been established that the property has already been sold, transferred and registered in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. To issue orders for injunction would be after the matter has been overtaken by events. Orders may not be made which cannot be enforced or which may be ineffective for practical purposes. This was the position reiterated in KALYASOI FARMERS CO-OPERATIVE SOCIETY -V- PAUL KIRUI AND ANOTHER [supra], it was held inter alia:



“As said, “Equity, like nature will do nothing in vain.” On basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the court will decline to grant it.”

38. The order the subject matter herein, was incapable of enforcement. The Respondent has not been said to have wilfully and intentionally violated the said order.

39. Considering the circumstances of this matter, it is clear that the Applicant is guilty of non-disclosure of material facts. Non-disclosure of material facts comes with consequences. Courts have said so again and again. Reliance was placed on the case of *Ruaba Concrete Co Limited -v- Paramount Universal Bank Limited* HCCC No. 430 of 2002, the Court stated:

“The duty is not to make full fair disclosure of all material facts, the material facts are those which is material for the Judge to know in dealing with the application as made, materiality is to be decided by the court, and not by assessment of the Applicant, and the Applicant must make proper inquiries before making the application. The duty to disclose therefore applies not only to any additional facts known to the Applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all circumstances of the case.....”.

40. The Petitioner came to court with unclean hands. The application should be dismissed.

41. On whether the court orders of November 17, 2021 entitled the Petitioner to reinstatement, counsel submitted, that Rule 17 Sub-rule [10] of the *Employment and Labour Relations Court [procedure] Rules 2016* provides that the court shall not grant an ex parte order that reinstates into employment an employee whose services have been terminated. To bolster these submissions, the case of *Angela Ndambuki v Kenya National Chamber of Commerce & Industry* [2018] eKLR, was cited. The order of November 17, 2021 did not contemplate a reinstatement.

42. The circumstances of this matter militate against a grant of the orders sought by the Applicant. They cannot therefore be availed to him. The Applicant did not meet the threshold for a successful contempt application.

### **Analysis and Determination**

43. Considering the material placed before me by the parties, I distil the following issues for determination.

- a. Whether the order of November 17, 2021, contemplated reinstatement of the Applicant.
- b. Whether the Respondent’s officers are guilty of contempt of the court order.
- c. What should be the fate of the Applicant’s application herein.

44. It is imperative to state that in an adversarial legal system as is ours, when one of the parties approaches court by way of an application, the court can only give order[s] that must be seen to flow from the application itself, and this becomes even more imperative when the order is made ex parte.

45. In her petition, the reliefs section thereof the Petitioner/Applicant sought:

- a. A declaration that the termination of the claimant by the Respondent on the grounds of redundancy is null and void;



- b. Reinstatement in the alternative;
  - c. 2 months' pay in lieu of notice.
  - d. Damages and or compensation under section 49 of the [Employment Act](#) for unfair termination.
  - e. Outstanding leave days.
  - f. Severance pay at 25 days' pay for each year worked for 5 years.
46. From the reliefs sought, it is not difficult for me to conclude that at the time of coming to court, the Petitioner/Applicant knew very well that her employment had been terminated. The grounds that were put forth on the certificate of urgency and on the Notice of Application dated November 15, 2021, are all indicative of the fact of termination of the Applicant's employment. Consequently, if indeed she desired to move the court at an interlocutory stage, for reinstatement, the order could have been sought specifically in the Notice of motion. By design or otherwise, the Applicant did not do this.
47. In this court's view, the process of issuing a redundancy notice, and termination of an employee's employment on account of redundancy are two distinct processes, to an extent that if one wants an order from court over one of the processes, he must specifically do so. There cannot be any room for confusing one process for the other.
48. The court is cognizant of the provisions of Rule 17 sub-rule 10 of the Employment and Labour Relations Court [Proceedings] Rules, 2016. An order for reinstatement shall not be given *ex parte*. The order of November 17, 2022, was *ex parte*. Without the order being specific on reinstatement and reasons therefore accorded, I am not able to see as one that intended a reinstatement of the Applicant into employment.
49. By reason of the premises, I find the answer to the issue in the negative.  
Whether the Respondent's Officers are guilty of contempt of the Court order.
50. From its definition "conduct that defies the authority or dignity of a court, because such conduct interferes with the administration of justice, it is punishable by fine or imprisonment"- Black's Law Dictionary, 9<sup>th</sup> Edition, the appreciates pretty well, why it must punish for contempt of court, in matters where it is established to the requisite standard that it has been committed. Administration of justice being the core business of court must be jealously guarded against being shaken or eroded by parties to a litigation or any other person, to void loss of public confidence in the court. Like public confidence is important to stock market, it is to the judicial system for administration of justice.
51. The Applicant alleges that the Respondent's officers are in contempt of the court order of November 17, 2021, as they have refused to reinstate her, and that therefore they must be punished. From the decisions cited by the parties in their submissions, there is one golden thread, the order alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or refrain from doing. See [Michael Sistu Mwaura Kamau v Director Public Prosecutions & 4 Others](#) [2018] eKLR, inter alia, in order for the application for committal for contempt to be successful.
52. Having found that reinstatement was not contemplated in the order, the subject matter of the Applicant's application, it is not difficult for this court to conclude that this ingredient was not satisfied.
53. In the upshot, I am not persuaded that the Respondent and or any of its officers violated the order of November 17, 2021, as alleged by the Applicant or at all. One cannot be said to be in contempt of



an order, yet the order did not command him or her to do that which he or she is accused of having deliberately failed to do.

**Of the fate**

54. By reason of the foregoing premises, this court hesitates not to dismiss the Applicant's application. It is hereby dismissed for destituteness in merit, with costs.

**DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2022**

**Ocharo Kebira**

**Judge**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2022**

**Stella Rutto**

**Judge**

**In the presence of:**

**Ms Kushindi for the Respondent.**

**Ms Masaki for the Claimant.**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**Stella Rutto**

**Judge**

