



**Otoch v Muthaura & another (Cause E 697 of 2022)
[2022] KEELRC 13564 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13564 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E 697 OF 2022
BOM MANANI, J
DECEMBER 15, 2022**

BETWEEN

ALBERT OTOCH CLAIMANT

AND

WILSON MUTHAURA 1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY HOLDINGS LTD .. 2ND RESPONDENT

RULING

1. Through the statement of claim dated September 29, 2022, the claimant, who is an employee of the 2nd respondent, has accused the 1st respondent of instigating an unlawful staff disciplinary process against him. The claimant avers that the 1st respondent issued him with a letter dated September 28, 2022 requiring him to show cause why disciplinary action should not be taken against him for gross misconduct.
2. In the claimant's view, the 2nd respondent's human resource manual vests the power to institute disciplinary proceedings against him in the claimant's immediate supervisor: not the 1st respondent. Consequently, the claimant argues that the disciplinary process commenced against him by the 1st respondent is illegal. By these proceedings, he prays for orders, inter alia, declaring the process illegal.
3. Accompanying the claim is an application dated September 29, 2022 through which the claimant prays for interim orders of injunction to restrain the respondents from carrying out the impugned disciplinary process pending the hearing and determination of the claim. The claimant also seeks interim orders of injunction pending the disposal of the application aforesaid.
4. The respondents are yet to file their responses to the statement of claim. However, they have opposed the application for the orders of interim injunction aforesaid. Opposition to the request for the interim orders is premised on the replying affidavit sworn by one Grace Korir on October 19, 2022.



5. From the court record, the matter was placed before Justice Jacob Gakeri on September 29, 2022 when the learned Judge issued the following orders:-
 - a) The application is certified as urgent.
 - b) The application be served upon the respondent and be responded to within 14 days.
 - c) The application be placed before any Judge of this court on October 26, 2022 for inter-partes hearing and or further directions on disposal.
 - d) The application is granted in terms of prayer number 2 of the notice of motion.
 - e) Costs shall be in the cause.
6. Upon service of the pleadings on the respondents, they filed the application dated October 21, 2022 seeking to discharge the above orders. Meanwhile, the claimant has filed the application dated November 7, 2022 seeking to have the respondents punished for contempt of the court orders issued on September 29, 2022. These latter two applications have been responded to by the parties through their respective replying affidavits on record.
7. When the matter came up on November 16, 2022, the court directed that all the applications be heard together. Further, it was directed that the applications be canvassed through written submissions. These orders were made in the sister file namely ELRC Cause No. E 696 of 2022.

Summary of Facts Informing the Applications

8. By a letter dated December 10, 2019, the 2nd respondent renewed the claimant's contract of employment as managing director, Ketepa for a period of 4 years effective 1st February 2020. The contract is meant to lapse on January 29, 2024.
9. It does seem that due to what appears to be boardroom wrangles within the 2nd respondent, the claimant was on September 28, 2022 cited for conduct unbecoming for allegedly storming the premises of the 2nd respondent on September 26, 2022 and aiding the former management of the 2nd respondent to hold a meeting therein, a matter that is said to have disrupted the functions of the 2nd respondent. The claimant was therefore issued with a letter requiring him to explain why disciplinary action should not be taken against him. The letter also suspended the claimant from duty. This letter was issued by the 1st respondent.
10. The claimant immediately moved to court to challenge this letter. It is the claimant's position that the 1st respondent is not his immediate supervisor. Therefore, the 1st respondent cannot institute the disciplinary process against him.
11. According to the claimant, the human resource policy of the 2nd respondent vests the power to trigger disciplinary action against an employee in the employee's immediate supervisor. The claimant contends that the group chief executive officer of the 2nd respondent is his immediate supervisor: not the 1st respondent. Consequently, the attempt by the 1st respondent to trigger the disciplinary process was in violation of the 2nd respondent's internal policy.
12. The letter of renewal of contract marked AOI on the claimant's affidavit dated September 29, 2022 indicates that he is to report to the 2nd respondent's board of directors through the board's chairman or to the group chief executive officer of the 2nd respondent. Section 6 of the Human Resource



Manual vests the power to trigger disciplinary action against employees in the 2nd respondent's controlling manager. Under clause 6.5 of the manual, the group general manager-human resource and administration only comes on board in disciplinary proceedings where: an employee has been issued with a notice to show cause; has responded to the notice to show cause; the response has been found wanting; and further disciplinary action has been recommended against the employee.

13. The claimant contends that although the 1st respondent describes himself as the group chief executive officer, his position at the 2nd respondent is that of general manager human resource and administration. Therefore, it was improper for him to assume the title of group chief executive officer and purport to superintend over the claimant.
14. Faced with these facts, the court (differently constituted) issued an order on September 29, 2022 stopping the disciplinary process. The order, inter alia, allowed prayer two (2) of the notice of motion which in effect provides as follows:-

“Pending the hearing and determination of the application dated September 29, 2022, an order of injunction is issued against the respondents, jointly and severally, their agents, servants, representatives or any other person acting under their instructions, barring them from commencing, proceeding or in any other way completing the disciplinary process as commenced vide the letter dated September 28, 2022 or in any other way interfering with the employment of the claimant.”
15. According to the claimant, the respondents were served with the order. However, there is no affidavit of service on record evidencing the fact of service of the order and pleadings. The fact that the respondents have entered appearance in the cause is of itself not necessarily proof of service of the order. The entry of appearance may merely signify service of summons to enter appearance.
16. Having said thus, it is clear to me that the respondents came to learn of the existence of the court order that was issued on September 29, 2022 at least by September 30, 2022. I gather this from the affidavit by Grace Korir in support of the application dated October 21, 2022. At paragraph 3 of the affidavit, she admits that the respondents were served with the order restraining them from proceeding or completing the disciplinary process against the claimant commenced through the respondents' letter dated September 27, 2022.
17. As mentioned earlier, the respondents filed the application dated October 21, 2022 seeking to have the orders of September 29, 2022 set aside. The basis for this request is that the claimant failed to disclose all material facts to the court at the time the orders were sought. The respondents accuse the claimant of painting the picture of being victimized by them for associating with the former Board members of the 2nd respondent.
18. The respondents state that the true reason that informed the disciplinary action against the claimant is that he engaged in acts of hooliganism by attempting a coup at the 2nd respondent's premises. It is contended that the claimant attempted to aid the forceful takeover of the operations of the 2nd respondent. That had this fact been brought to the court's attention, the learned Judge would not have granted the orders in question.
19. On the other hand, the claimant moved the court on November 7, 2022 seeking to have the respondents punished for disobeying the court order of September 29, 2022. It is the claimant's case that despite the respondents being served with the order they went ahead to interfere with the claimant's employment by inter alia, withholding a portion of his salary.
20. In response to the application for contempt, the respondents have filed affidavits whose general import is that: they were not served with the orders; they were not aware of the orders; the orders allegedly



disobeyed were vague; they did not disobey the order as they did not interfere with the claimant's employment or continue with disciplinary action against him.

21. The respondents contend that the claimant was already suspended on the date the orders issued. Consequently, he was already on half salary in line with the applicable human resource manual. In their view, maintaining the status quo as at September 29, 2022 was not in contempt of the court order.
22. Since disobedience of court orders is a matter that the court must take seriously, I will begin by addressing the application for contempt of court. It is true that the claimant did not file evidence of service of the order of September 29, 2022 on the respondents. However, I note that the 2nd respondent's officer, one Grace Korir admits service of the orders on September 29, 2022. Further, she indicates that she understood the order as restraining them from proceeding with disciplinary action against the claimant in terms of the respondents' letter of September 28, 2022.
23. Despite knowledge of the order as admitted by the said Grace Korir in her affidavit dated October 21, 2022, the respondents through the affidavit by one Mathews Odero try to paint a different picture regarding their knowledge of the order as indicated in the preceding sections of this ruling. The manner in which the respondents deal with this issue is a clear demonstration of attempts at circumventing the order of the court. On the one hand, they deny service of the order. On the other hand, they state that the order was vague suggesting that it was served but was incomprehensible.
24. The respondents also try to suggest that there was no violation of the order since they stalled the disciplinary process where it had reached after issuance of the suspension letter. They neither interfered with the claimant's employment nor proceeded with the disciplinary action against him. It is their contention that matters lay where they fell in line with the 2nd respondent's human resource manual and that since the orders did not direct for the lifting of the suspension or restoration of the claimant's full salary, there was no violation by the respondents' failure to lift the suspension or pay the claimant full salary for October 2022.
25. The law on contempt of court is now fairly well settled. Whilst it is important that before a party is punished for defying a court order there ought to be evidence that he was served with it, evidence of knowledge of existence of the order notwithstanding absence of proof of personal service is sufficient to require compliance with the order. In addressing this issue Lenaola J in *Basil Criticos v Attorney General and 8 others* [2012] eKLR said 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.”
26. The contention by the respondents that they were not personally served with the order is of no consequence where there is evidence that they had knowledge of its existence. And evidence that the respondents knew of the existence of the order as early as September 30, 2022 is discernible from the affidavit by Grace Korir dated October 21, 2022.
27. The other issue that the respondents raise is that the order was vague. I do not agree with this submission. The order required the respondents to refrain from conducting the disciplinary process initiated in their letter of September 28, 2022 or in any other way interfering with the claimant's employment. This order was in my view clear enough for the respondents to appreciate its import and tenor. It prohibited their action against the claimant as commenced in their letter dated September 28, 2022.



28. It is worth commenting that at the time the learned Judge issued the order, the letter of September 28, 2022 was before him. Therefore, he was aware of the obtaining state of affairs with regard to the claimant's contract of employment at the time.
29. The letter of September 28, 2022 had the following effect in relation to the claimant's employment contract: it suspended him from duty; it placed him on half salary; and it required him to explain why he should not be punished for acting in the manner he was accused of. It is these and other acts of interference with the claimant's contract of service that the order targeted. To argue otherwise would be to scorn the court process.
30. The respondents suggest that the order was vague. However, they did not seek the court's interpretation of it. And neither did they apply that the order be set aside on account of its alleged vagueness.
31. It is impermissible for a litigant to act in respect of a court order in the manner that the respondents have done. They had a duty to ensure that the claimant's contract ran uninterrupted in terms of the court order. To withhold the claimant's salary and to let his suspension remain in place was in disregard of the court order.
32. In my view, there is sufficient evidence to demonstrate that: the respondents were aware of the court order issued on September 29, 2022; they defied the order; and they are therefore in contempt of court.
33. I will therefore require the respondents to purge the contempt by paying the claimant his full salary pending further orders of this court. I will also require the respondents to cease the disciplinary process in terms of the court order of September 29, 2022 by setting aside the suspension of the claimant pending further directions by this or any other court.
34. The second application is the one dated October 21, 2022 which seeks to set aside the court orders of September 29, 2022. This application can be considered simultaneously with the application dated September 29, 2022 which seeks that the orders of injunction in place be confirmed pending the hearing and determination of the case.
35. The prayer for confirmation of injunction orders restraining the respondents from processing the disciplinary action against the claimant and the prayer seeking to lift the orders restraining the respondents from undertaking the process speak to the employment concept of managerial prerogative of the employer at the workplace.
36. As has been stated often times, employers enjoy managerial prerogative to manage human resource issues within their organizations in the manner that they deem fit. They are at liberty to make decisions that they deem necessary for the general wellbeing of the enterprise (see *Anne Wairimu Kimani v Kenya Agricultural Livestock Research Organisation* (KALRO) [2017] eKLR). This power entitles the employer to hire, transfer, re-designate, deploy and discipline staff as appropriate.
37. The general position in law is that courts should exercise utmost restraint in interfering with the exercise of this power. To do otherwise is tantamount to the court taking over the position of the employer at the workplace (see *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR).
38. Notwithstanding the aforesaid, the exercise of the employer's managerial prerogative must not be abused by the employer to the detriment of employees. The power must not be exercised in a manner that is contrary to the law and the internal regulations that govern the relationship between the parties.



39. Where there is evidence of manifest abuse of this power, the court will intervene to ensure observance of due process. In *Thomson Kerongo & 2 others v James Omariba Nyaoga & 3 others* [2017] eKLR, the court observed as follows on the subject:-
- “The court will only interfere where there is breach of the process and even so, only with a view to setting the process right.”
40. In *Ali v National Health Insurance Fund & 2 others; Transparency International & 2 others (Interested Parties)* (Cause E714 of 2022) [2022] KEELRC 13443 (KLR) the court said the following in respect of the power of the court to question the employer’s exercise of the power:-
- “In effect, it is clear to me that whilst courts lean towards protecting the principle of managerial prerogative to allow the employer to run the workplace in the manner that he deems best, they are nevertheless prepared to question the use of this power where it appears to have been invoked for ulterior reasons and in violation of the law governing the subject matter under consideration. Ultimately, whether a court should intervene in the exercise of the power is a matter to be determined on a case by case basis.”
41. The prima facie record before me is indicative of an ongoing Boardroom battle between two groups seeking to control the 2nd respondent. This fact comes out in the ruling by Mbaru J in ELRC Cause No E861 of 2021 Alfred Njagi v Kenya Tea Development Holdings Limited (unreported) and the affidavits filed by the parties. This battle has found its way into the corridors of the court. Currently, a number of matters to determine the rightful directorship of the 2nd respondent are pending resolution before the High Court. The learned Judge mentions a number of cases in which the matter is pending as High Court Constitutional Petitions Nos E083 of 2021, E 245 of 2020 and E 243 of 2020.
42. To confirm this battle, the disputants in the case before me have each provided company resolutions justifying the positions they take in this matter. For instance, the claimant has relied on the resolution of September 26, 2022 to assert that the 1st respondent is not the group chief executive officer of the 2nd respondent having allegedly reverted to the position of group general manager- human resource and administration. On the other hand, the respondents (or at least the 1st respondent) through the affidavit of Grace Korir dated November 15, 2022 have provided a resolution dated February 22, 2022 by which the 1st respondent is allegedly recognized as the group chief executive officer of the 2nd respondent.
43. Whilst the claimant alleges that the individuals who conducted the alleged Board meeting of the 2nd respondent on September 26, 2022 are legitimate directors of the 2nd respondent and lawfully issued the resolution aforesaid, the deponents of the affidavits in support of the respondents’ case state otherwise. Further, Grace Korir relies on a company search marked EXH 2 to assert that the 2nd respondent’s correct team of directors is as contained in the search. The list does not include names of the individuals appearing in the claimant’s copy of resolution marked AO4 on the affidavit in support of the application for injunction dated September 29, 2022.
44. The respondents do not deny that the claimant is an employee of the 2nd respondent. However, the powers of the 1st respondent to instigate disciplinary action against the claimant are questioned based on the Boardroom wrangles in the 2nd respondent.
45. For the moment, the court cannot state with any degree of certainty who the directors of the 2nd respondent are. As appears from the ruling by Mbaru J aforesaid, this issue is live in the several cases that are now pending before the High Court. And this court has no jurisdiction to wade into the matter.
46. Further, it has been suggested on oath by the claimant in his further affidavit dated October 25, 2022 that the individuals who appointed the 1st respondent as the group chief executive officer were



irregularly elected as directors of the 2nd respondent in violation of court orders in High Court Petitions numbers 87 of 2020 and 83 of 2021 that barred election of directors of the 2nd respondent. This insinuation is self evident from the annexed affidavit by John Kennedy Omanga sworn on October 12, 2022. The insinuation directly brings into question the legitimacy of the 1st respondent to hold the office of group chief executive officer of the 2nd respondent and therefore exercise disciplinary control over the 2nd respondent's employees.

47. Grace Korir, relying on the official search marked EXH 2 on her affidavit of November 15, 2022, contends that the individuals mentioned by the claimant as directors of the 2nd respondent are impostors. I however note that the official search relates to Kenya Tea Development Agency Limited. The 2nd respondent is described in the pleadings before me as Kenya Tea Development Agency Holdings Ltd. On the face of it, these are two different entities. I cannot therefore rely on the said official search to hold that the directorship of the 2nd respondent is as asserted by Grace Korir.
48. That being the position, it has not been established that the 1st respondent lawfully holds the position of group chief executive officer of the 2nd respondent with the authority to institute disciplinary proceedings against the claimant. This is a matter that the parties have to establish at the full trial of the cause.
49. It will be imprudent to jeopardize the claimant's employment on the basis of the shaky premise presented by the 1st respondent to claim disciplinary control over him. With the ongoing boardroom wrangles at the 2nd respondent, it is imprudent to hold at this stage that by the claimant associating with either of the purported directors of the 2nd respondent, he acted in a manner that borders on gross misconduct. It is not possible at this stage to state with certainty that the individuals purporting to mete out disciplinary action against the claimant are legitimately entitled to do so. These are matters that can only be established through full trial of the cause.
50. With regard to the request to lift the orders issued on September 29, 2022, the respondents aver that the claimant obtained the orders fraudulently to the extent that he withheld critical information from the court. In their submissions dated November 24, 2022, the respondents accuse the claimant of failing to disclose the following: that he attempted to aid what they describe as the former directors of the 2nd respondent to take over the management of the 2nd respondent using extra legal means; that there was a directorship dispute with respect to the 2nd respondent that was pending in the High Court; that PK Kanyago was a former and not current chairperson of the 2nd respondent's Board; and that the resolution of September 26, 2022 was by former directors of the 2nd respondent.
51. I have considered these averments in the context of the respondents' application dated October 21, 2022. From the application and the affidavit in support thereof, it is apparent that the only ground of non-disclosure that is raised by the respondents relates to the attempted takeover of the 2nd respondent's office on September 26, 2022. The several other grounds of non-disclosure that have been raised in the submissions of the respondents are not pleaded as grounds of non-disclosure either in their application dated 21st October 2022 or the affidavit of even date in support of the application.
52. The application dated September 29, 2022 is supported by the claimant's affidavit of even date. On the affidavit is annexed a copy of the letter issued to the claimant dated September 28, 2022. The letter sets out in detail, the grounds for sending the claimant on suspension. He is accused of aiding the former directors of the 2nd respondent stage an illegal meeting at the 2nd respondent's premises. Looking at the contents of the letter which the claimant disclosed to the court through his affidavit it is clear that he spoke to the issue of the attempted takeover of the 2nd respondent's offices which the respondent now plead was not disclosed. This being the only ground of non-disclosure mentioned in the application



dated October 21, 2022, it is difficult to comprehend how the respondents would allege non-disclosure of material facts that were actually disclosed.

53. A final comment will be on the submissions by the respondents that the Court of Appeal issued an order of status quo through its ruling in *Mungania Tea Factory Co Ltd & 51 others v Attorney General & 6 others* (Civil Application E143 of 2022) [2022] KECA 718 (KLR). It is suggested that the effect of the order was to affirm the legitimacy of the set of directors of the 2nd respondent that are recognized by the respondents at least until the dispute on the 2nd respondent's directorship is resolved.
54. I have looked at the order aforesaid. Through it, the court stayed the proceedings in High Court Petitions No E 254 of 2020, E 243 of 2020 and E083 of 2021. So far as I can decipher, there was no mention of status quo in it. However, if the parties are in doubt as to the import and tenor of the Court of Appeal order, they are duty bound to seek clarification from that court instead of giving the order their own varied interpretations.

Disposition

55. In the premises, the claimant's application dated September 29, 2022 is allowed as presented.
56. The respondents' application dated October 21, 2022 is dismissed.
57. The court finds that the respondents acted in contempt of the court order issued on September 29, 2022. The respondents are ordered to purge the ongoing contempt occasioned by their non compliance with the court orders issued on September 29, 2022 by lifting the claimant's suspension and paying his full salary pending the hearing of this claim.
58. Costs of the applications are granted to the claimant.
59. Parties are at liberty to list the matter for hearing on priority basis.

DATED, SIGNED AND DELIVERED ON THE 15TH DAY OF DECEMBER, 2022

B. O. M. MANANI

JUDGE

In the presence of:

..... for the claimant

.....for the 1st and 2nd respondents

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

