



**Sayi v Muthaura & another (Cause E 696 of 2022)
[2022] KEELRC 13565 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13565 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E 696 OF 2022
BOM MANANI, J
DECEMBER 15, 2022**

BETWEEN

ENG JAPHETH SAYI CLAIMANT

AND

WILSON MUTHAURA 1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY HOLDINGS LTD .. 2ND RESPONDENT

RULING

1. Through the Statement of Claim dated September 28, 2022, the Claimant 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 27, 2022 requiring him to justify 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 28, 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 October 26, 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 reiterated on November 16, 2022.

Summary of Facts Informing the Applications

8. By a letter dated November 22, 2019, the 2nd Respondent altered the Claimant's contract of employment from that of indefinite to fixed term of three (3) years. The contract was to run from December 1, 2019 to November 30, 2022. The Claimant's new position within the 2nd Respondent's rank and file was shown as that of General Manager-KTPC.
9. It does seem that due to what appears to be Boardroom wrangles within the 2nd Respondent, the Claimant was on September 27, 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 variation of contract marked GK4 on the replying affidavit by Grace Korir dated October 19, 2022 indicates that the Claimant was to report to the 2nd Respondent's Group Chief Executive Officer. 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 Group 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 28, 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 27, 2022 or in any other way interfering with the employment of the Claimant.”
15. According to the Claimant’s Advocates, the Respondents were served with the order on September 30, 2022. There is an affidavit of service on record dated October 5, 2022 evidencing the fact of service of the order and pleadings.
16. 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.
17. 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.
18. 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 withholding a portion of his salary. Further, it is contended by the Claimant that the Respondents proceeded to hire his replacement notwithstanding the court order in question.
19. In response to the application for contempt, the Respondents have filed affidavits whose general import is that: there is no evidence of personal service of the orders; there is no evidence of willful breach of the order; 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.
20. 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.



21. 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. Despite the Respondents denying service of the court order, there is evidence that they were served. The Claimant's Advocate has filed an affidavit of service dated October 5, 2022 in which he deposes to the fact of having served the Respondents with the court order on September 30, 2022. This affidavit has not been challenged.
22. To give further credence to the fact of service of court processes on the Respondents, the Claimant's Advocate has filed in court copies of documents bearing the receipt stamp of the Legal Department of the 2nd Respondent. This evidence coupled with the entry of appearance of the Respondents into this cause leads to the inescapable conclusion that they were duly served. Accordingly, I hold that there is sufficient proof of service of the orders of September 29, 2022.
23. Despite service of the order, the Respondents through the affidavit of 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 require 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 Vs 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. Evidence that the Respondents knew of the existence of the order issued on September 29, 2022 is discernible from the affidavit by Mathew Odero dated November 15, 2022 when he avers that because the order was vague, the Respondents cannot be said to have deliberately failed to comply with it. There is also an express confirmation of service of the order on the Respondents in the affidavit by Grace Korir dated October 21, 2022. Importantly, as has been mentioned earlier, there is proof of service of the order on the Respondents by way of an affidavit of service which the Respondents have not impugned.
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 27, 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 27, 2022.
28. It is worth commenting that at the time the learned Judge issued the order, the letter of September 27, 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 27, 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. Further, the Claimant has deposed in his affidavit in support of the application for contempt that despite being served with the order, the Respondents in effect terminated his contract by replacing him with another person. It is noteworthy that in their response to the application, the Respondents have avoided addressing this fact. They in effect do not deny that the 2nd Respondent replaced the Claimant notwithstanding the presence of the court order.
 32. 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 go ahead to replace him was in disregard of the court order.
 33. 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.
 34. I will therefore require the Respondents to purge the contempt by paying the Claimant his full salary under the 2019 contract coming to a close on November 30, 2022. I also reprimand the officer of the 2nd Respondent, one Mathew Odero for taking the court order for granted by swearing an affidavit intended to justify the Respondents' deliberate disregard for the order. Should such conduct be repeated, the court will not hesitate to punish the said officer.
 35. 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 28, 2022 which seeks that the orders of injunction in place be confirmed pending the hearing and determination of the case.
 36. 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.
 37. 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.



38. 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).
39. 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.
40. 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.”
41. 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.”
42. 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.
43. 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.
44. 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 JS4 on the affidavit in support of the application for injunction dated September 28, 2022.

45. The Respondents do not deny that at the time of filing this cause, the Claimant was an employee of the 2nd Respondent based on the contract of service dated November 22, 2019. 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.
46. 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.
47. 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. However, the said allegation remains the subject of litigation before the High Court.
48. 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.
49. 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.
50. On the other hand, the Respondents have deposed on oath that the individuals who issued the resolution of September 26, 2022 are no longer in office as directors of the 2nd Respondent. They aver that the rightful directors of the 2nd Respondent are those listed in the search marked EXH2 above having allegedly been validly elected into office. Again, the legitimacy of this argument is the subject of the litigation that is pending before the High Court.
51. From the history I have referred to in the preceding sections of this ruling, it is clear that the question regarding who are the lawful directors of the 2nd Respondent remains a live matter before the High Court. Consequently, this court cannot pronounce itself on whether the right group of directors is that fronted by the Claimant or Respondents. Concomitantly, the court cannot determine at this preliminary stage whether the actions by either set of directors are legitimate.
52. There is no evidence to suggest that the 1st Respondent is legitimately appointed to the position of Group Chief Executive Officer of the 2nd Respondent to enable him exercise disciplinary control over the Claimant as the authority of the set of directors who purportedly appointment the 1st Respondent into this position is disputed. Similarly, there is no evidence that the group of directors



who purportedly extended the Claimant's contract beyond November 30, 2022 had authority to do so their legitimacy in office having been contested before the High Court and the said court having not pronounced itself on the matter.

53. It will therefore be imprudent for this court to wade into the question of the validity of the Claimant's extended contract beyond November 30, 2022 based on the impugned resolution of September 26, 2022 by one camp of the Boardroom combatants. These are matters that can only be established through full trial of the cause.
54. In the event the Claimant is able to demonstrate at the main trial that his contract was legitimately renewed but has subsequently been unlawfully terminated, he can be adequately compensated by an order for damages.
55. 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.
56. 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

57. In the premises, the Claimant's application dated September 28, 2022 is allowed only to the extent to which it relates to the contract of service between the parties as contained in the letter of change of employment status dated November 22, 2019.
58. The court shall make no orders on the validity of the contract of service allegedly renewed between the parties through the resolution issued on September 26, 2022 as the legitimacy in office of the individuals who sanctioned the renewal on behalf of the 2nd Respondent is the subject of ongoing litigation before the High Court.
59. Accordingly, the orders of injunction against the Respondents are lifted for the reasons aforesaid but in respect of the continued relationship between the parties as from December 1, 2022.
60. The Respondents are ordered to purge the contempt occasioned by their non compliance with the court orders issued on September 29, 2022 in relation to the contract of service between the Claimant and the 2nd Respondent as contained in the letter of change of employment status dated November 22, 2019. The Respondents should do so by making good the Claimant's full salary and emoluments under the said contract. For the avoidance of doubt, this order does not extend to the contract of service allegedly renewed through the disputed resolution of September 26, 2022 whose validity the court has declined to comment on at this preliminary stage.
61. Costs of the applications are granted to the Claimant.
62. 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

