



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.E200 OF 2021

JACK WANGAI MAINA.....CLAIMANT

VERSUS

BRITAM HOLDINGS LIMITED.....RESPONDENT

RULING

The claimant filed application dated 16<sup>th</sup> March, 2021 under the provisions of section 5 of the Judicature Act and seeking for orders that;

- a. An order be issued summoning the Group Managing Director – Tava Madzinga and Human Resource Director – James Maitho; to personally attend court to show cause why they should not jointly and severally be punished for disobeying the Court Order issued on 9<sup>th</sup> March, 2021.
- b. An order be issued summoning the Group Chief Information Officer – Michael K Mwangi and Manager IT Security – James Chege to personally attend court to for cross examination on the on goings regarding the claimant’s access to the IT system.
- c. An order for Committal to civil jail for a period of not exceeding six (6) months for contempt of court do issue against the following officials of the respondent; Group Managing Director – Tava Madzinga, Human Resource Director – James Maitho; for illegally refusing to allow the claimant continue working as the Group Chief Operating Officer in disobedience of the court order issued on 9<sup>th</sup> March 2021.
- d. Mr James Maitho be punished for perjury on his affidavit dated 12<sup>th</sup> March 2021 as the court deems fit.
- e. Any other order the court deems fit to protect the dignity and authority of the court.
- f. The respondent to bear the costs of this application.

The application is supported by the Supporting Affidavit of the claimant and on the grounds that respondent is in wilful contempt of the orders made on 9<sup>th</sup> March, 2021 as on 16<sup>th</sup> March, 2021 the claimant cannot access the necessary infrastructure to continue working as orders by the court. The claimant has not been granted access to the IT systems, physical and has been working from home. Despite writing emails to the human resource director seeking access to the IT systems this has not been granted. This is one work tools and despite changing the email password he cannot log in without details of what was changed. From 4<sup>th</sup> March, 2021 the claimant was denied physical access and despite sending emails there is no response. Due to COVID-19 all respondent’s staff have been working from home and office and the IT systems to facilitate working from home access has been denied to him.

This is wilful disobedience of court orders and the court has power to summon the respondent and its officers to show cause why they should not be punished for contempt.

In his **Supporting and Supplementary Affidavits**, the claimant avers that on the orders issued by the court on 9<sup>th</sup> March, 2021 the respondent has disobeyed as they have denied him access to IT systems. He wrote on 10<sup>th</sup> and 13<sup>th</sup> March, 2021 seeking access to IT systems but was only given email password and cannot log in without the details of what has been changed and with email only he cannot access the virtual private network (VPN). He requires such access to work from home.

The claimant also avers that James Maitho has committed perjury and should be punished. In his affidavit and explanation as to how IT systems work he has gone out to derail the course of justice and the claimant remains without access to the VPN which has not been sent to him and cannot undertake his duties. His role and user should be normal save as an executive of the respondent has user rights to collaborations tools such as email access to the Oracle Enterprise Planning systems with manager rights for approval as per the approval matrix with multiple level of approvers and cannot be singled out from access.

The claimant also avers that in violation of the court orders, the respondent has hired new employees even as the Voluntary Early Retirement (VER) is on-going and before a formal redundancy is announced the respondent has brought on board other executives. Example is finance Director, Charles Kimani Njuguna who joined on 3<sup>rd</sup> March, 2021 despite the existence of Finance and Strategy and Group Chief Finance officer. The respondent has failed to follow company policy and procedures and the reason the interlocutory injunctions herein are sought to secure his claim pending hearing.

Induction is on-going even before VER is over or formal redundancy process is complete and this is proof that the redundancy is a smokescreen for the current executives being unfairly kicked out of the company despite the court orders.

There is potential damage if the rule of law is not secured and the orders sought should issue.

In reply, the respondent filed the Replying affidavit of James Maitho the director, human resources and who avers that the orders of the 9<sup>th</sup> March, 2021 directed for status quo and preserving the claimants employment as the Group Chief Operating Officer (GCOO) on the terms that in the interim employment be preserved with payment of salaries and benefits and the VER to remain voluntary. The claimant remains an employee and has been paid all his salaries and has access to the necessary facilities and infrastructure to enable him discharge his duties as the GCOO.

There is no contempt of court as alleged and the respondent has given the court due respect with regard to the orders issued on 9<sup>th</sup> March, 2021. The respondent has not taken any action affecting the claimant's employment.

Mr Maitho also avers that the alleged denial of access to the IT infrastructure alleged by the claimant has not addressed how such matter has affected the performance of work and the claimant cannot use the instant application to urge orders sought in application dated 8<sup>th</sup> March, 2021 save his employment should be preserved pending hearing of his application. The demands by the claimant is to seek superior and absolute access to the entire IT infrastructure of the respondent than he had prior to the VER which speak of mischief. Such access is unrelated to the job description which entails overseeing operations and which role does not require access to the entire IT infrastructure and only emails communication is sufficient.

With regard to email access, the claimant was given access on 16<sup>th</sup> March, 2021 following connectivity challenges and which is not related to the VPN which is now sought and made source of the contempt proceedings.

The claimant has never been denied physical access as alleged. His last physical attendance at the offices was on 3<sup>rd</sup> March, 2021 prior to filing the instant proceedings. Such cannot be a cause for contempt proceedings.

All respondent employees have the flexibility to work from home due to COVID-19 pandemic and with regard to the claimant's duties; he only requires email access and not the VPN. The demands made for IT infrastructure access will be in breach to data security and privacy. In any event, materials submitted in support to the application demonstrate that the claimant has had access to the system and the application for contempt only meant to embarrass senior officers of the respondent and should be declined.

Mr Maitho also avers that the perception by the claimant that new officers have been recruited is not correct as pending the outcome of the dispute herein the respondent has preserved his position save on 18<sup>th</sup> March, 2021 the new executive leadership team was unveiled and none of the positions mentioned involves the recruitment of a GCOO. While the media reports are erroneous and indicating the claimant's position has been scrapped, this is a misrepresentation of facts.

Upon the orders of 9<sup>th</sup> March, 2021 the directions with regard to the VER, the respondent wrote to the claimant and extended the time for his response on the VER but has declined to respond. The same remained voluntary.

Both parties attended and made oral submissions.

The claimant submitted that there is contempt of court and in reply the respondent has failed to respond as to how the claimant has been allowed an enabling work environment to undertake his duties from home and what other employees have been affected. Access to emails is not similar to access to the VPN and the actions by the respondent are meant to defeat the sub strum of the suit and had access been allowed this application would have been unnecessary and should be allowed with the call for examination of the cited officers to show cause why they should not be punished for contempt.

The respondent submitted that there is no contempt as alleged. The orders of 9<sup>th</sup> March, 2021 were specific that employment be maintained, payment of salary and benefits and the on-going VER to remain voluntary and which the respondent confirm has been adhered to. There is no breach to justify the contempt proceedings. The VER was not stopped and to accommodate the claimant the respondent extended the same and wrote to the claimant in this regard but he failed to address. The claimant is seeking to have the court address internal operations of the respondent which is unnecessary. His job description does not require the nature of access sought and to insist on absolute access to the IT infrastructure is not in good faith.

The respondent has filed a list of case and relied on the case of **Kenya Plantation and Agricultural Workers Union v James Finlay (K) Limited [2013] eKLR** that;

*The court considers that the employer is entitled to undertake redundancy just like the other human resource functions like recruitment and selection, appointment and promotion, training and development and termination of the contract of service including dismissal on disciplinary grounds. The general principle is that the court shall not interfere in the employer's entitlement to undertake these functions and interference by the court shall be exercised very sparingly. The court's rare intervention can be*

*justified on account of obvious breach by the employer of the statutory or agreed due process or such other manifest injustice and in circumstances whereby the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process*

And in the case of *A S L v National Bank of Kenya Limited & another* [2018] eKLR that;

*This Court has taken the position that the Court should not interfere with internal disciplinary processes of an employer, as this is tantamount to descending into the arena of the employer's prerogative duties. ...*

And in the case of **Kenya Union of Commercial, Food and Allied Workers versus Menengai Oil Refineries Limited Cause No.476 of 2017 (Nakuru) Court** that an employee who deliberately declines to take advantage on internal grievance mechanisms and held as follows;

*.....an employee who squanders the internal grievance handling mechanisms provided for by the employer cannot claim to have been unfairly treated. Well advised to be accompanied by a fellow employee of his choice but opted to bring a third party, the grievant lost his chance to a hearing at the shop floor. He cannot then turn around and assert his right to a hearing.*

And in the case of **Communications Workers Union v Camusat Kenya Limited [2020] eKLR** The Court held that an employer has the right to restructure its operations;

*I have further taken into account that this is a case of redundancy and that an employer has a right to carry out redundancy provided it complies with the law in the process and has valid reason for doing so. The issues of procedure and valid reasons are matters that are subject to evidence at the hearing. Taking this into consideration, the balance of convenience would tilt in favour of allowing the Respondent to carry out the redundancy and dealing with the propriety of the redundancy during the hearing of the main suit.*

### **Determination**

A court will punish conduct that defies its authority and dignity and to preserve and secure the rule of law. upon application or on the face of any conduct that go contrary to the administration of justice the court should stop all else and punish contempt.

However, to take such action there must be good cause removing the court from its ordinary business and divert attention to address contempt. Contempt proceedings should therefore only arise in the clearest of cases to allow the court undertake its normal and ordinary transactions. See **Teachers Service Commission v Kenya National Union of Teachers & 2 others [2013] eKLR** and reference to the case of **Johnson v Grant, 1923 SC 789 at 790** that;

*The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.*

On 9<sup>th</sup> March, 2021 the court heard the claimant on his application filed under Certificate of Urgency and dated 8<sup>th</sup> March, 2021 and in the interim and to allow service upon the respondent and attendance on 16<sup>th</sup> March, 2021 Ordered as follows;

2. *THAT in the interim and pending service and attendance for inter parties hearing parties shall maintain the status quo and in terms of ORDER (3) of the Notice of Motion dated 8<sup>th</sup> March, 2021 the claimant shall maintain his position with the respondent as Group Chief Operating Officer;*

3. *THAT in the interim and pending attendance for the inter parties hearing the claimant shall be paid his due salary and allowances/benefits accruing to his position as the Group Chief Operating Officer until further directions;*

4. *THAT in the interim and pending attendance for inter parties hearing the Voluntary Early Retirement (VER) on-going shall remain voluntary until further directions;*

5. *THAT noting the urgency and schedule dates for the VER; serve the respondent ...*

On the above cited orders the claimant's case is that there is contempt of court and the respondent through its officers has refused to obey orders issued on 9<sup>th</sup> March, 2021 by *illegally refusing to allow the claimant continue working as the Group Chief Operating Officer in disobedience of the court order issued on 9<sup>th</sup> March 2021.*

The orders of 9<sup>th</sup> March, 2021 directed parties to maintain the *status quo* and the three (3) core limbs being;

- a. Employment be preserved pending attendance and further directions;
- b. Salary and benefits be paid pending attendance and further directions; and
- c. The VER to remain voluntary pending further directions.

To understand the orders in any other manner would be incorrect.

Whereas the court was moved by the claimant through his application dated 8<sup>th</sup> March, 2021 and interim orders issued, where the claimant was keen to address specific issues with regard to his access to the IT system, physical access and work from home, to secure his rights and have the court hear both parties, interim orders issued to preserve the *status quo* as addressed above. To cite the respondent and its officers for contempt outside of the specific orders sought is to engage in rush business.

An analysis of the claimant's Supporting Affidavit and Supplementary Affidavit the court cannot find cessation of employment. There is no allegation that salary and benefits payment has stopped. The VER is noted as being voluntary.

The nitty gritty matters addressed with regard to access to IT systems and particularly access to the VPN vide letters dated 10<sup>th</sup> and 13<sup>th</sup> March, 2021 these do not lead to termination of employment which is preserved. The averments made with regard to physical access from 4<sup>th</sup> March, 2021 relates to a period prior to the court being moved and well addressed in the application dated 8<sup>th</sup> March, 2021 and which the court addressed with the referenced orders of 9<sup>th</sup> of March, 2021 securing employment. Further with regard to working from home and access to the VPN the option to work from home by the claimant remains open. At this stage and before the court can hear both parties on the merit, to create a perception that work from home is meant to show that the claimant has deserted work is not correct. The option to work from the office or at home is for a given reason, to accommodate all employees due to the COVID-19 pandemic. To take it otherwise would be to construe given facts.

The purpose and purport of contempt proceedings should remain for the protection and safeguarding the honour and dignity of the court and not otherwise to be misused to steal a march against the other party. See **Clerk, Nairobi City County Assembly v Speaker, Nairobi City County Assembly & another; Orange Democratic Party & 4 others (Interested Parties) [2019] eKLR.**

this is more so because the primary purposes of civil contempt is to preserve the court's authority and to punish for disobedience of its orders where there is disobedience and where there is no disobedience and a party has done and complied as directed and required by the court, why then drag such a party to court in contempt proceedings? Such can only be for reasons that are not lawful and in abuse of court process.

On the evidence before court, the court finds no negation of the orders issued on 9<sup>th</sup> March, 2021. There is compliance as directed and no matter that demonstrate breach.

**Accordingly, application dated 16th March, 2021 is found in abuse of court process and is hereby dismissed with cost to the respondent. Directions shall issue on the pending application of 8<sup>th</sup> March, 2021.**

**As directed on 24<sup>th</sup> March, 2021 the court finds it necessary to restate the same herein;**

- a. employment of the claimant is preserved pending hearing of the Notice of Motion dated 8<sup>th</sup> March, 2021 unless otherwise lawfully removed from such office;**
- b. the claimant shall keep off the respondent's premises and virtual platforms;**
- c. the VER time period lapsed the respondent is at liberty to move to the next phase of its reorganisation.**

**Orders accordingly.**

**DELIVERED AT NAIROBI THIS 29<sup>TH</sup> MARCH, 2021.**

**M. MBARU**

**JUDGE**

In the presence of: .....