



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1667 OF 2011

AND

IN THE MATTER OF CONTEMPT PROCEEDINGS TO ENFORCE THE ORDERS OF THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA ISSUED ON 18TH NOVEMBER, 2011 AND IN THE RULING DELIVERED ON 28TH MARCH, 2014

CLYDE ALIELO KHAYIYA & 27 OTHERS.....CLAIMANTS

VERSUS

PROFESSOR ANDREW MAKANYA

THE CHAIRMAN BOARD OF MANAGEMENT

NGARA GIRLS HIGH SCHOOL.....1ST RESPONDENT/CONTEMNOR

DR. BEATRICE NDIGA PRINCIPAL/

SECRETARY BOARD OF MANAGEMENT

NGARA GIRLS HIGH SCHOOL.....2ND RESPONDENT/CONTEMNOR

RULING

1. The applicants filed a Notice of Motion Application dated 23/3/2020 praying for an order in the following terms: -

(i) Spent.

(ii) That the Respondents Professor Andrew Makanya and Dr. Beatrice Ndiga be committed to Civil jail for six (6) months for contempt of this Honourable Court's orders issued on 18/11/2011 and 28/3/2014 respectively in Cause No. 1667 of 2011.

(iii) That the contemnors severally and jointly be compelled to purge the contempt forthwith and allow the 1st Claimant/Applicant Rose Njeri Wandere be reinstated to her employment and their withheld salaries and benefits be fully paid and they be reinstated on the payroll

2. The application is premised on grounds set out on the face of the application numbered 1 to 13 and buttressed in the founding affidavit of Clyde Alielo Khayiya sworn to on 23/3/2020.

3. The gravamen of the application is that this suit is still pending conclusion of hearing on the merits since the claimant's closed their case in February, 2013 and the Respondents have not prosecuted the defence.

4. That the claimants/Applicants have suffered intimidation, threats, and victimization since they filed this suit on 9/9/2011 with the sole aim to have the claimants withdraw the suit.

5. That on 11/2/2015 five (5) of the claimants were served with letters of termination with effect from 25/1/2013.

6. That the five claimants were reinstated by the Court through a Ruling of Rika, J. dated 28/5/2014.
7. That the deponent and the Matron of the school Madam Rose Njeri Wandere (24th Claimant) have been branded the ring leaders of the claimants and the respondent has consistently pushed them to withdraw suit.
8. That on 20/1/2020 the deponent was served with a letter signed by the Principal Dr. Beatrice Ndiga raising certain allegations and the deponent was placed on compulsory leave for 21 days. The letter is annexed and marked "CAK2."
9. That on 12/2/2020, the deponent returned to the school as directed in the letter but was denied entry at the school gate by Security guard on instructions of the Principal.
10. That the school matron was at the same time placed on six months' suspension on accusations of bringing a stranger to the school, Labour Officer Mr. Peterson Asuma. That the Matron Rose Njeri Wandere was served with a letter of termination of service dated 12/2/2020 marked "C.A.K.4".
11. That the salary of the deponent and that of the matron was frozen whilst on compulsory leave and suspension respectively.
12. That the conduct of the Respondent is in violation of the Court orders that were issued in this matter and Penal Notice served on the Respondents on 23/11/2011.
13. That the advocates for the claimants served the Hon. Attorney General with notice of intention to cite the respondents with contempt of Court and the said notice was copied to the Respondents and the orders of the Court attached. The letter dated 18/2/2020 and annexed is marked "C.A.K.5."
14. That the Respondents have no regard for the dignity and authority of the Court and have acted in contempt of the orders of the Court and the Court should act to safeguard its authority.
15. Affidavit of Service marked "C.A.K.6" is annexed to the supporting affidavit.
16. The orders contained in the Ruling of the Court dated 8/3/2014 attached to the application read: -

"[12] Against the background the Court orders: -

- (a) The Respondent acted in contempt of the Court by terminating the 5 claimants' contract of employment before the main dispute is fully heard and determined.
 - (b) The Respondents shall forthwith reinstate the 5 claimants to positions they held immediately before the 25th January, 2013.
 - (c) The respondents shall pay the 5 claimants all their salaries and allowances dating back from 25th January, 2013, within 14 days of the delivery of this Ruling.
 - (d) The Respondents may undertake fresh disciplinary processes against the 5 claimants only after the main claim is heard in full and determined.
 - (e) The Respondents are severely warned that should there be no compliance with the orders given herein, or should there be further violations, custodial sentences shall be imposed against each and every contemnor.
 - (f) The parties to schedule the Respondents' case for hearing and a suitable date at the Registry.
17. The 1st and 2nd Respondents filed Replying Affidavit sworn to by Dr. Beatrice Ndiga, the current Principal of Ngara Girls High School, and Secretary to the Board of Management.
 18. She deposes that she took over as Principal of the school on 8/1/2019 as soon as a fire gutted the school's dormitories on 5/1/2019. That investigations revealed that the fire was caused by arson.
 19. That she was not aware of an existing Court order nor was the same brought to her attention by the current Board members. That since the suit was filed, there has been two other principals.
 20. That since she became Principal, the 1st Claimant/Applicant has had a number of disciplinary issues and complaints made against him. That the 1st Claimant/Applicant has been causing dissent and disregard for School Rules and encouraging indiscipline by and amongst parents and students in the school and also interfering with school workers.
 21. The deponent cites inflammatory statements made to school security Guards by the 1st Applicant to the effect that management would not succeed in stopping school fires because the fires are well planned.

22. In November, 2019, the 1st respondent engaged in a rationalization exercise of non-teaching staff as a result of which seven (7) non-teaching staff members were to be declared redundant. The 1st Applicant was affected by that exercise.
23. That the labour office was involved in that exercise. That all affected staff were notified of the decision including the applicant.
24. That on 20/8/2020, another complaint arose against the applicant who was accused of inciting parents, refusing to obey the school rules and acting in a manner prejudicial to the safety of the students. Letters marked "BN3" from Lavington Security dated 20/1/2013 is annexed for ease of reference.
25. That the 1st respondent met and resolved to send the applicant on compulsory leave to pave way for investigations in compliance with the school's procedures.
26. Meanwhile, the applicant was recalled and released on grounds of redundancy and communication to the 1st applicant to that effect is marked "BN5."
27. The 1st respondent wrote a letter to the 1st applicant informing him of the decision to declare him redundant. The letter is marked "BN6". The same was served on the 1st Applicant by a process server attached to the replying affidavit.
28. That the 1st Applicant has never come back to the school since 20/1/2020 and was therefore not denied entry to the school.
29. That the 1st Applicant was paid terminal benefits in the sum of Kshs. 183,183,00 which money was deposited into the 1st Applicant's bank account on 12/2/2020.
30. That a demand letter from Khamati Githinji Ashiruma & Chege Advocates dated 13/2/2020 and received by the Principal on the same date on behalf of the 1st Applicant clearly dealt with the issue of retrenchment as a new matter and there was no mention of the existing claim. Letter is marked "BN8."
31. That some claimants in the old suit have since died, others have resigned and others have retired. In 2013 and 2015 there was attempt to settle the suit out of Court by the deponent's predecessors. The workers' issues were resolved and their salary increased including that of the 1st Applicant.
32. That the deponent has spoken to existing claimants about the old suit and their report contradicts the allegations by the 1st Applicant.
33. That on 8/8/2011, eight (8) claimants wrote to the advocates on record and copied the office of the Attorney General withdrawing from the suit. Letter is annexed and marked "BN10."
34. That the 1st Respondent has in no way intimidated, threatened or harassed the claimant for refusing to withdraw the suit.
35. That the claimant/Applicant is abusing the Court process to the detriment of the school and safety of the children.
36. That the Claimant/Applicant has no authority of any of the other claimants to act on their behalf or to represent them in this application.
37. That this is a new dispute that cannot be hedged on an old suit. That the case of Rose Wandera against the school is Cause No. 1800 of 2016 and different from the present suit.
38. That the application before Court is an abuse of Court process and same lack merit and it be dismissed with costs.
39. The 1st claimant/Applicant filed a supplementary affidavit sworn to on 22/1/2021. The 1st claimant reiterates the contents of his supporting affidavit and joins issue with the 1st respondent on the matters set out in the replying affidavit.
40. The 1st Claimant insists that the named persons are in contempt of Court.
41. That no rationalization process was conducted by the school. That the claimant was not taken through a disciplinary process. That at the time of the said rationalization, the 1st claimant was working as a guard and not a grounds man. That the letters referred to by the Principal were never served on the claimant. That he was seeing them for the first time.
42. That no redundancy procedure was followed and in any event during that time, the school recruited new staff including a Bursar, 2 matrons, cook, internal security and Grounds man.
43. That the claimant was declared unwanted person at the school and security was given strict instructions not to allow the claimant in the school.
44. That on 20/1/2020 the claimant was sent on compulsory leave. That the letter of redundancy dated 4/2/2020 was not served on the claimant and had just seen it for the first time. That he was not served with a payment voucher, however, the payments reflected in his account.

45. That the respondent has deliberately delayed conclusion of this case since the claimant closed his case in February, 2013, same is pending defence hearing to date.

46. That the issues in dispute have not been resolved. That the 1st respondent cannot speak on behalf of the claimants.

47. That the contemnors be punished accordingly.

Determination

The issues for determination are: -

(i) Whether the application before Court is a competent contempt of Court application.

(ii) If the answer to (i) above is in the affirmative, whether the applicant has proved to the required standard, allegations of contempt of Court by the named persons.

(iii) What reliefs if any should the Court grant.

48. Since the repeal of the Contempt of Court Act, 2015, an application for contempt of Court is to be filed in terms of Section 5 of the Judicature Act.

49. Section 38 of the nullified Contempt of Court Act had repealed Section 5 of the Judicature Act.

50. The law as regards contempt before the enactment of the contempt of Court Act was restated in **Christine Wangari Gachege –vs- Elizabeth Wanjiru Evans and 11 Others [2014] eKLR.**

51. In the case the Court found that the English law on committal for contempt of Court under Rule 81.4. of the English Civil Procedure Rules which deals with breach of judgment, was applicable by virtue of Section 5(1) of the Judicature Act, which provided that: -

“The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate Courts.”

52. This Court is therefore presently guided by the applicable English Law which is part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of Court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.

53. This being the case as was stated by the Court of Appeal in the case of **Christine Wangari Chege –vs- Elizabeth Wanjiru Evans & Others** (supra)

“In as far as it relates to the High Court of Justice: -

(i) An Application to the High Court of England for committal for contempt of Court will not be granted unless leave to make such an application has been granted.

(ii) An application for leave must be made *ex parte* to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.

(iii) The applicant must give notice of the application for leave not later than the preceding day to the crown office.

(iv) Where an application for leave is refused by a judge in chambers the applicant may apply *afresh* to a divisional Court for leave within 8 days after refusal by judge.

(v) Where leave has been granted, the substantive application by a motion would be made to a divisional Court.

(vi) The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.

(vii) The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.

54. These rules are applied in Kenya with uneven degree of consistency, however following the implementation of the Lord Woolfs ***“Access to justice Report 1996.”*** The Rules of the Supreme Court of England are gradually being replaced with Civil Procedure Rules, 1999.

55. Now Rule 81.4 of the Civil Procedure (Amendment No.2) Rules, 2012 is applicable on breach of judgment.

56. In Christine Wangari case, the Court of Appeal pointed out that leave is now not required where committal procedure relate to a breach of a judgment, Order or undertaking.

57. The Court of Appeal concluded: -

“We find that on the basis of the new Civil Procedure Rules (*of England*) contained in the second supplement to the 2012 White Book, no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this Court’s order.”

58. On this basis, I find that it was not necessary for the applicant to seek leave before bringing this application. However, the applicant must personally serve the application on the alleged contemnors.

59. In this respect, there is no evidence at all that this application was personally served on Professor Andrew Makanya and the applicant has not disclosed in the application who exactly is Professor Andrew Makanya and how he is related to the alleged facts, said to constitute contempt of Court in the Notice of Motion, supporting affidavit or in the supplementary affidavit. Indeed, no facts at all have been disclosed by the applicant to this Court which creates any nexus to Andrew Makanya, or to any extent to show and or prove to the required standard any conduct on the part of Andrew Makanya which demonstrates that he was in any way in breach of the Court orders issued by Justice Rika on 18/11/2011 and 28/3/2014.

60. Furthermore, the applicant bears the onus of demonstrating that the alleged contemnors were at all material times aware of the Court orders alleged to have been breached.

61. In this respect, Dr. Beatrice Ndiga deposed that she had only recently on 5/1/2019 been appointed to the school. She deposed at paragraph 8 of the replying affidavit thus: -

“That I was not aware of an existing Court order neither was the same brought to my attention and knowledge by the current Board members since I took over as the Principal. Since this claim was filed there has been two other principals in between and the Board of management members have since changed.”

62. The Applicant has the onus of discharging the burden of proof that indeed Dr. Beatrice Ndiga and Andrew Makanya were served with the stated Court orders dated 18/11/2011 and 28/3/2014. There is no express deposition by the applicant in the supporting affidavit or in the supplementary affidavit that indeed he had served or caused to be served on the two alleged contemnors, the two court orders.

63. Furthermore, the applicant has not demonstrated to the satisfaction of the Court that he had brought to the attention of the two alleged contemnors the existence of the two Court orders.

64. The Court is further satisfied that the Applicant’s employment was severed from the 1st respondent by a declaration of redundancy. The declaration of redundancy was not an act contemplated and or within the purview of the present cause of action in Cause No. 1667 of 2011.

65. Indeed, if the applicant is aggrieved by the severance through declaration of redundancy, he is within his rights to file a suit challenging the lawfulness of that particular termination by the 1st respondent which came more than nine (9) years from the date this cause of action was instituted and about 8 years since the 1st order was issued on 18/11/2011 and about 6 years since the second order was issued on 28/3/2014.

66. Notice of intended redundancy dated 10/11/2019 was sent to the Nairobi, County Labour office.

67. The Notice of intended Redundancy to the Applicant dated 4/2/2020 was duly written to the claimant and he was paid terminal benefits which fact he acknowledged.

68. The letter of demand dated 13/2/2020 written by Khamati & Co. Advocates did not address the current dispute between the Applicant and the 1st respondent as an old dispute relating to the previous orders of the Court.

69. The Claimant/Applicant has failed to prove to the standard required by law on a balance of probabilities but not beyond reasonable doubt, that the declaration of redundancy of the Applicant by the respondent was done in willful defiance of the Court orders issued by the Court some many years ago in a different contextual setting.

70. The applicant has not demonstrated what steps he has taken to get the pending suit finalized since he closed his case on 7/2/2013.

71. The record does not show any steps taken by either the claimants nor the respondents to have the suit concluded on priority basis as justice Rika, J. had directed in his Ruling dated 28/3/2014.

72. Accordingly, in answer to the three issues for determination in this matter, the court finds that the application lacks merit with respect to both persons cited for contempt of Court. The applicant has failed to prove that the two alleged contemnors are in willful disregard of the named Court orders in any respect or at all.

73. The application is thus dismissed with costs in the cause.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 of the Civil 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.

MATHEWS N. NDUMA

JUDGE

Appearances:-

Ashiruma & Co. Advocates for the Applicant

Leah Odhiambo State Counsel.

Ekale - Court Assistant