



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. E314 OF 2021

LENA CHEMOIWO.....CLAIMANT/APPLICANT

VERSUS

BOMAS OF KENYA.....RESPONDENT

THE GENERAL MANAGER BOMAS OF KENYA MR. PETER GITAA....1ST CONTEMNOR

THE HUMAN RESOURCES MANAGER BOMAS OF KENYA

MR. JIMMY OKINDIAGI.....2ND CONTEMNOR

THE HEAD OF PROPERTY MANAGEMENT DEPARTMENT, BOMAS OF KENYA

MR. JOSEPH WILLIE NJOROGE KAMAU.....3RD CONTEMNOR

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 15th June 2021 seeking for Orders that:

1. THAT this Honourable Court be pleased to cite and punish by issuance of order of committal to civil jail against the 1st, 2nd and 3rd Contemnors for disobeying court orders issued by this Honourable Court on 22nd April 2021 directing *inter alia*-,

a) That in the interim and to allow service to the Respondent, the Claimant shall oblige notice dated 21st April, 2021 save employment shall not be compromised.

2. THAT this Honourable Court be pleased to direct that the alleged Contemnors do remit immediately to the Applicant withheld monthly salary for the months of January, February, and March 2021 amounting to Kshs. 448,257/-, plus interest accrued thereon and the subsequent months not remitted for as long as the Claimant/Applicant is under the employment of the Respondent.

3. THAT this Honourable Court be pleased to direct the Respondent/Alleged Contemnor and the Contemnors, to continue remitting to the Applicant her monthly salary and dues as per her pay slip and grant the Applicant unlimited access to her work place until the hearing and determination of this application and Claim.

4. THAT the cost of this application be borne by the Contemnors.

2. The Application is premised on the grounds that contrary to the court orders, the Contemnors continue to deny the Applicant access to her office and make it impossible for her to carry out her duties in accordance to her contract of employment which is still in force to date. That during court attendance on 8th June 2021, the Respondent's advocate also undertook that the Claimant/Applicant would not be denied any access to her work place, and that he would further immediately notify the Respondent to remit the Claimant/Applicant's withheld salaries which have not been remitted since January 2021. That despite the Contemnors' non-compliance of the court orders having been brought to the attention of the Honourable Court on 8th June 2021, they have elected to further their contempt of the said orders. That it is evident the dignity and integrity of the Court is under attack and continues to be prejudiced by the Contemnors' actions and there is consequently no other way of enforcing the orders other than through the Courts. The Applicant further asserts that the said orders have not been set aside and

or varied by any competent court and are thus in force to date and that it is in the interest of justice and preservation of the rule of law that this Honourable Court intervenes and punishes the Contemnors for contempt and grants the orders sought in the Application herein.

3. The Claimant/Applicant depones in her Supporting Affidavit that the Respondent, its agents, servants, employees were also bound by the said undertaking of Mr. Masese as the Respondent's advocate on record. She avers that court orders are not made in vain and are meant to be obeyed. She annexes copies of the Court Orders dated 16th April 2021 and 22nd April 2021 respectively together with a copy of the letter dated 10th June 2021 addressed to the Respondent's Advocates on record and copied to the Contemnors seeking for their compliance to the Court orders.

4. The Respondent filed a Replying Affidavit sworn on 7th July 2021 by its Acting Human Resource Manager, Jimmy Okidiang. He depones that the Claimant/Applicant is a former employee of the Respondent as her contract of employment was terminated via a letter dated 27th April 2021 due to gross misconduct. That the Claimant has previously sought orders to stop the Respondent from proceeding with the disciplinary process against her, but the Court directed her to comply with the invitation as directed by the Respondent and appear before disciplinary. That when she finally appeared for her hearing, the disciplinary committee heard her and made a decision that her services be terminated having failed to explain how she secured a contract of employment with enhanced benefits. That the Claimant/Applicant then abandoned her application seeking to stop the disciplinary process and sought to amend the Claim and pursue her unpaid salary.

5. He further depones that whereas the orders issued by Justice Mbaru directing the Claimant to appear before the disciplinary committee and pending which appearance the employment relationship was not to be compromised, the Court did not direct that the Respondent does not make a decision not to issue any. He denies that the Respondent is in contempt of the court orders and avers that the Claimant's application is misconceived and bad in law and ought to therefore be disregarded as she was lawfully dismissed from employment. He depones that the orders sought by the Applicant should be disallowed in the interest of justice.

6. The Claimant/Applicant submits that the averment in the Respondent's response that she sought to amend her claim should be expunged together with the annexure as they seek to introduce new matters which were not before the Court or brought to its attention by the Respondent. She further submits that it is trite law that where with notice of institution of the Claimant's suit and a prayer made in it to restrain the doing of a certain act but the Respondent does that act and thereby alters the factual basis upon which the Claimant claimed their relief, an injunction issues in such a case so that the Respondent cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. That in such a scenario the Court ought to compel the Respondent to restore the position which existed at the date of the suit and which has been observed in numerous cases. The Claimant/Applicant submits that the Respondent and the Contemnors have not tendered or availed any evidence to prove that the alleged letter of summary dismissal was served upon her for them to now seek to rely on the same and evade being unanswerable to the contempt which is not purged. She contends that termination of her employment had not crystalized by the time the Respondent's advocate made his aforementioned undertaking and neither was she in receipt of the same and submits that the Respondent's advocate would have notified the Court if the same were true. She refers to **Black's Law Dictionary, 9th Edition, page 360** which states as follows:

"Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

7. She submits that in **Halsbury's Laws of England**, it is stated that "it was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment....an application to court by him not being entertained until he had purged his contempt". She submits that the alleged Contemnors cannot allege ignorance of the said orders because the Legal representative on record for the Respondent was aware that the Court had made the orders dealing with the various acts done by the Respondent. She cites that case of **Antony Siyuyu Kisiang'ani & Another v Nzoia Out-growers Company Limited & 4 Others [2014] eKLR** where the Court stated that in instances where a party has instructed and is lawfully represented by an Advocate, he/she cannot allege ignorance of the Court Orders. She submits that the Court of Appeal in **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** also posed the question whether knowledge of a court order or judgment by an advocate of the alleged contemnor would be sufficient for purpose of contempt proceedings and answered the question in the affirmative stating that:

"We hold the view that it does. This is more so in a case as this one where the advocate was in court representing the alleged contemnor.....There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him to report back to the client all that transpired in court that has a bearing on the clients' case..."(Emphasis hers)

8. She further submits that she fully associates with the sentiments in the case of **Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 Others [2017] eKLR** where the Court quoted the book "**The Law of Contempt**" **Butterworths [1996] Pages 555-569** where learned authors **Nigel Lowe & Brenda Sufrin** stated as follows:-

"Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside." (Emphasis theirs)

9. That the Respondent and Contemnors have further taken no effort to explain the unpaid salaries owed from January 2021 the subsequent months to the alleged time of termination. The Applicant construes the same to not only be constructive termination in itself and utter contempt of orders and an undertaking which have not been set aside but also an aim to financially embarrass her. That she is of advanced age and had taken a loan on the strength of her contract of employment, a fact which is in the Respondent and Contemnors' knowledge and which loan, she currently has to find alternative means to service. The Claimant/Applicant submits that the alleged letter of summary

dismissal by the Respondent is not only in blatant breach of the court orders in place but also contravenes Sections 35, 44 and 45 of the Employment Act and the Doctrine of legitimate expectation. She further submits that Romer, L.J. in **Hadkinson v Hadkinson, [1952] ALL ER 567** as cited with approval in the case of **Salome Nyambura Kang'ethe T/A Shalom Enterprises & 13 Others v Nairobi City County & 8 Others [2016] eKLR**, stated that

“It is the plain and unqualified obligation of every person against, or in respect of whom an Order is made by a court of competent jurisdiction to obey it unless and until that Order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an Order believes it to be irregular or even void.”

10. The Claimant/Applicant submits that determining whether an act amounts to contempt is premised on willful disobedience or defiance to a particular order and that the word willful connotes an act which is intentional, concise and deliberate. That if a party who is fully in the know of the order of the Court or is conscious and aware of the consequences and implications of the Court's order ignores it or acts in violation of the order such as in the instant case, it must be held that such disobedience is willful. She further cites the Supreme Court case of **Board of Governors Moi High School Kabarak v Malcolm Bell & Another, (Supreme Court Petitions Nos. 6 & 7 of 2013)** where the Court pronounced itself on the power to punish for contempt, defining it as a power of the Court to safeguard itself against contemptuous or disruptive intrusion from elsewhere and without which power protection of citizens' rights and freedoms would be virtually impossible and Courts of law would further be reduced to futile institutions spewing forth Orders in vain. She urges this Court to find the Respondent and Contemnors have intentionally and in bad faith rubbished the Parties' attendance and proceedings of 6th June 2021 and seek to mislead and misrepresent the actual position. She further prays that the Court grants appropriate orders as prayed in the Contempt Application in order to preserve the dignity and authority of the court. Neither the Alleged Contemnors nor the Respondent filed any Submissions.

11. The present motion seeks to punish for contempt. As we all know, the Contempt of Court Act, Act No. 46 of 2016 was declared unconstitutional as per the decision of the High Court of Kenya in **Kenya Human Rights Commission v The Attorney General & Another [2018] eKLR, Constitution Petition No. 87 of 2017**. The said declaration meant that courts effectively reverted to Section 5 of the Judicature Act which previously formed the basis of contempt of court proceedings in Kenya but which provision had also been repealed by Section 38 of the impugned Act. The law currently governing contempt of court proceedings in Kenya is the law currently applicable in England in regard to contempt of court proceedings which is Rule 81 of the Civil Procedure (Amendment No. 2) Rules of 2012. The inherent power of the court to punish for contempt is further captured under Section 3A of the Civil Procedure Act. The Court of Appeal has severally addressed the issue of the standard of proof in respect to contempt of court proceedings; to be beyond reasonable doubt such as in the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** where the Court stated that the court has to be satisfied beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The Court of Appeal further held in **Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another, Civil Application No. 39 of 1990** (unreported) that the authority and dignity of our Courts should be upheld at all times as an essential for the maintenance of the rule of law and good order. In this case, the Respondent has not denied notice and knowledge of the said Orders of this Honourable Court of 22nd April 2021 and the same is therefore not in contention. This Court is to decide whether or not the Applicant has discharged the burden of proof that the alleged Contemnors acted in willful disobedience of the orders of the Court. The Court should also question whether the Respondent has demonstrated that they immediately sought to have the said Order reviewed or set aside or appealed against. This is especially on the backdrop of authorities that the burden of proof in Contempt of Court proceedings is beyond reasonable doubt. The analysis of the three judge bench in the case of **Martin Nyaga Wambora & 4 Others v Speaker of the Senate & 6 Others [2014] eKLR** on the effect of disobedience of court orders was that that anything done in disobedience of court orders is null and void *ab initio* that is to say it is a nullity in law. In the case of **Tribe Hotel Ltd v Josphat Cosmas Onyango [2018] eKLR**, the Court of Appeal observed that:

*“21...as the judge correctly pointed out, that the rule of law demands compliance with court orders. In a recent decision in **Justus Kariuki Mate & another vs. Martin Nyaga Wambora & another [2017] eKLR**, the Supreme Court of Kenya underscored that court orders are “people's solemn edict calling for obedience...”*

22. In the same judgment, the Supreme Court adopted with approval the words of the court in the English case of **M v. Home Office and Another [1992] 4 All ER 97** that:

“An order which is made by a court with unlimited jurisdiction is binding unless and until it is set aside. Common sense suggests that this must be so. Were it otherwise court orders would be consistently ignored in the belief, sometimes justified, that at some time in the future they would be set aside. This would be a recipe for chaos.”

12. Further in the case of **Council of Governors v Seth Panyako & 4 Others; Ministry of Labour and Social Protection & 2 Others (Interested Parties) [2019] eKLR, Cause No. 69 of 2019**, Abuodha J. held as follows:

“An allegation of contempt of court is a serious one since if proved, would greatly undermine the authority of the court. The issue is therefore more of serious concern to the court than the party to the benefit of whom the order was made. It therefore does not matter the novelty or otherwise of submissions by Counsel. The issue is plain and simple. That is to say was there an order lawfully issued by the court? If so was the order reasonably brought to the attention of the person to whom it was directed? And finally has the person complied with the order? If not has the person sought at the next available opportunity to have the order reviewed or set aside or appealed to superior court against the order?

A party against whom a court order has issued does not have the discretion to elect whether to obey the order or not. Willful disobedience to a court order is an affront to the rule of law and administration of justice which is a recipe for chaos and anarchy. The court when confronted with an allegation of wilful disobedience to its authority must seize the moment and stamp its authority by swiftly and appropriately punishing for such disobedience.” (emphasis mine)

13. In my considered opinion, since the Order made by this Honourable Court on 22nd April 2021 is yet to be set aside or discharged, the

same remains valid and binding upon the Respondent and the 3 Alleged Contemnors. As they have all been proved to be in contempt beyond a reasonable doubt, I accordingly convict the alleged contemnors Mr. Peter Gitaa, General Manager Bomas of Kenya, Mr. Jimmy Okidiangi – the Human Resources Manager Bomas of Kenya and Mr. Joseph Willie Njoroge Kamau – Head of Property Management Department Bomas of Kenya. Coupled by the fact the 3 Contemnors have not shown any remorse whatsoever for their wilful disobedience of the Court orders issued by Mbaru J. they are each sentenced to pay a fine of Kshs. 500,000/- within the next 3 days and in default of making the said payment each shall serve 3 months jail sentence for their wilful disobedience of Court orders.

14. I further direct and order that the Respondent and the 3 Contemnors to remit immediately to the Applicant withheld monthly salary for the months of January, February and March 2021 amounting to Kshs. 448,257/-, and the subsequent months not remitted for as long as the Claimant/Applicant is under the employment of the Respondent. Further I hereby direct and order the Respondent and the 3 Contemnors, to continue remitting to the Applicant her monthly salary and dues as per her pay slip and grant the Applicant unlimited access to her work place until the hearing and determination of this Claim. The cost of this application shall be borne by the Respondent and the 3 Contemnors jointly and severally.

It is so ordered.

Dated and delivered at Nairobi this 27th day of July 2021

Nzioki wa Makau

JUDGE