



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. E091 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: VIOLATION OF CONSTITUTIONAL RIGHTS OF ENG. BERNARD M. NGORE

AND

IN THE MATTER OF: STANDARDS ACT (CAP 40) LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLES 41, 27, 232, 73, 75, 153 AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015

BETWEEN

ENG. BERNARD M. NGORE..... PETITIONER

VERSUS

CABINET SECRETARY, MINISTRY OF INDUSTRIALIZATION, TRADE

AND ENTERPRISE DEVELOPMENT.....1ST RESPONDENT

ATTORNEY GENERAL..... 2ND RESPONDENT

BETTY C. MAINA.....1ST ALLEGED CONTEMNOR

DR. FRANCIS O. OWINO.....2ND ALLEGED CONTEMNOR

RULING

1. Before me, is the Petitioner’s Notice of Motion dated 19th January, 2021 filed under Certificate of Urgency on 21st January, 2021 in which he seeks the following orders:-

i. Spent

ii. THAT the Court do find the following persons in contempt of the Court Order made on 3rd December 2020 that is:

1. Betty C. Maina – Cabinet Secretary

2. Dr. Francis O. Owino – Principal Secretary

iii. THAT the contemnors be directed to personally attend Court during the hearing of this Application.

iv. THAT the contemnors cited at prayer (2) above be punished for contempt of Court by committal to civil jail for a period of not more than Six (6) Months or as directed by the Court and/or fined Kshs. 500,000/= each in accordance with the Law.

v. THAT the Court do declare and make an order to the effect that any meeting, transaction and/or resolution made or decision take by the National Standards Council not properly constituted in accordance with Section 6 and 7 of the Standards Act without a legally and properly constitute National Standards Council is invalid, unconstitutional, null and void.

vi. THAT costs be provided for.

2. The Application is premised on the grounds that the Respondents and the Alleged Contemnors are in breach of this Court's Orders issued on 3rd December, 2020. The Orders were issued pursuant to the Ex-Parte hearing of the Petitioner's Notice of Motion dated 2nd December, 2020 filed under Certificate of Urgency on 3rd December, 2020.

3. The Orders issued by Nzoki Wa Makau J. were as follows:-

1. THAT the application be served for inter parties hearing on 14th December, 2020.

2. THAT a Conservatory Order of Stay be and is hereby issued staying the implementation of the Gazette Notice No. 9589 dated 20th November, 2020 by the 1st Respondent revoking the appointment of the Applicant as the Chairman of the National Standards Council, pending hearing and determination of this Application on 14th December, 2020.

4. The Petitioner in his Affidavit in support of the Contempt Application sworn on 19th January, 2021, depones that the Orders were served upon the Respondents and alleged contemnors with a forwarding letter on 4th December, 2020 and that the Alleged Contemnors acted in breach of those Orders.

5. The Contempt Application is opposed by the Respondents and Alleged Contemnors who filed a Replying Affidavit sworn by **DR. FRANCIS OWINO**, the 2nd Alleged Contemnor on 4th February, 2021 in which he depones that they did not disregard the Orders as alleged by the Petitioner.

6. Pursuant to this Court's directions of 1st February 2021, that the Contempt Application be disposed of by way of written submissions, the parties filed and exchanged written submissions which I have considered.

Analysis and Determination

7. It is trite law that there are four essential elements that must be proved to establish contempt of Court. Mativo J. in the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 Others [2020] eKLR** as cited by the Petitioner in his submissions aptly captured these elements as follows: -

40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.^[46] Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand^[47] who succinctly stated:-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b. the defendant had knowledge of or proper notice of the terms of the order;
- c. the defendant has acted in breach of the terms of the order; and
- d. the defendant's conduct was deliberate.

41. It is the last test in paragraph (d) above that warrants detailed consideration.

8. Owing to the nature of contempt proceedings having penal consequences, the standard of proof required is higher than that of civil cases but not to the degree of proof beyond reasonable doubt as required in criminal cases. [See **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR**]

9. It is not in dispute that the orders were indeed issued and that the terms of the orders were clear and unambiguous.

10. On the second limb with regards to knowledge and service of the orders, the Petitioner submitted that the Orders were served upon the Respondent but was silent on the personal service of the Alleged Contemnors. He submitted that there was notice of the said Orders vide the forwarding letter dated 4th December, 2020 produced at page 1 of the annexures in the Supporting Affidavit to the Contempt Application.

11. The Respondent on the other hand submitted that personal service was not effected upon the Alleged Contemnors and as such they cannot be said to be in contempt of the said Orders.

12. Personal service of orders is no longer necessary to prove contempt. Knowledge of the orders suffices as was held by the Court of Appeal in *Shimmers Plaza Limited v. National Bank of Kenya Limited (2015) eKLR* where the Court stated as follows:

“The dispensation of service under Rule 81.8 of the Civil Procedure (Amendment No. 2) Rules, 2012

1. is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, otherwise would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience. This Court in the **Wambora case (supra)** affirmed the application of these requirements.”

13. The Court went on to state that;

“On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre-condition to liability in contempt...**Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference are proved.**(See *Avery v. Andrews(1882) 51LJ Ch. 414*) (Emphasis added)”

14. It is apparent from the Replying Affidavit filed by the 2nd Alleged Contemnor that the Alleged Contemnors had notice and/or knowledge of the Orders. It was pursuant to these Orders that the 2nd Alleged Contemnor issued the letter dated 9th December 2020 directing the Managing Director of the KEBS to cease holding any Board Meetings until further guided by the Ministry. The 1st Alleged Contemnor being the Cabinet Secretary was also in copy in the letter. I find that the Respondent and the Alleged Contemnors had knowledge of the Orders and were therefore compelled to comply with them.

15. With regard to whether the orders were disobeyed by the Alleged Contemnors, it is the Petitioner’s contention that Alleged Contemnors had disobeyed the Orders in the following manner: -

i. The Alleged Contemnors issued a letter dated 9th December 2020 making reference to Orders as a basis to stop the Petitioner from discharging his duties.

ii. That a Board Meeting was called on 1st January 2021 and held virtually 14th January 2021 where the Contemnors issued links to the virtual meeting but declined to issue the link to the Petitioner. The Petitioner deposed, that even after the Petitioner procured the link from a colleague, the Alleged Contemnors declined to admit him into the meeting.

iii. That there was another meeting held at the 2nd Alleged Contemnor’s boardroom on 4th January 2021 where the Petitioner was excluded.

iv. That on 12th January, 2021, when the Managing Director of the Kenya Bureau of Standards (KEBS) asked the 2nd Alleged Contemnor on the position of the National Standards Council Quarterly meeting scheduled for 28th January, 2021, the Alleged Contemnors wrote a response on 19th January, 2021 approving the meeting to be held in the absence of the Petitioner.

v. The Petitioner has been unable to perform his duties since the Alleged Contemnors issued the said letters/circulars stopping his attendance to board meetings.

16. The Respondent and the Alleged Contemnors submit that the letter dated 9th December, 2020 was issued for the reason that the immediate past Chairperson had been re-instated to resume his duties. There was thus an uncertainty as to who should occupy the position of the Chairperson between the Petitioner and the immediate past Chairperson.

17. It is their submission that the Ministry directed the KEBS to cease holding any meetings until advised otherwise by the Ministry with a view of obtaining clarity. They further submit that the Petitioner has not been barred from discharging his duties as alleged and in fact chaired the Board Meeting held on 28th January, 2021.

18. With respect to the virtual meeting held on 4th January, 2021, the Respondent submitted that the said meeting was not a Board Meeting but a consultative meeting with the Ministry. They also maintained that the Petitioner was never barred from attending the meeting and was provided with a link to the meeting.

19. It has not been denied by the Petitioner that he attended and chaired the Board meeting that took place on 28th January, 2021.

20. I have considered the letter dated 9th December, 2020 and I am not persuaded that issuance of the said letter constituted a breach or indeed a wilful disobedience of the Orders. It appears to have been an attempt to hold off conducting of any business of the Board when there were apparently two Chairpersons of the Board.

21. Further, it is not apparent from the photograph of the virtual meeting attendance list or the physical attendance sheet produced by the Petitioner that he attempted to join the meeting and was not admitted.

22. The power to commit an alleged contemnor for contempt of court is one to be exercised only with evidence beyond peradventure as a finding of guilt may lead to a denial of liberty.

23. Having found that the Petitioner has failed to establish that there was wilful disobedience of the orders, I dismiss the contempt application. Costs of the application will abide the outcome of the petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JULY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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, the 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 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the 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.

MAUREEN ONYANGO

JUDGE