



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. E614 OF 2020

DR. ALLAN PAMBA.....CLAIMANT

VERSUS

THE KENYA HOSPITAL ASSOCIATION FOR AND

ON BEHALF OF THE NAIROBI HOSPITAL.....1ST RESPONDENT

DR. IRUNGU NDIRANGU.....2ND RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 11th December 2020 seeking for Orders that the Respondents be cited for contempt of this Honourable Court's orders issued on 4th December 2020 and be directed to purge the same. He further seeks for this Honourable Court to commit the 2nd Respondent to civil jail for six months and/or require him pay a punitive fine, for this Court to issue any other orders it deems fit for the purpose of protecting the dignity and authority of this Honourable Court and for costs of the Application to be provided for. The Application is premised on the grounds that this Honourable Court heard the Motion dated 4th December 2020 *ex-parte* on the same date and allowed prayers 1 and 2 and unequivocally ordered as follows: -

a) THAT the Application be certified urgent and be served forthwith.

b) THAT Conservatory Orders do issue in terms of prayer 2 of the Application pending *inter partes* hearing on 10th December 2020.

2. The Claimant asserts that the said prayer 2 in the Motion dated 4th December 2020 and granted by this Court provided as follows:

“THAT pending the inter partes hearing and determination of this Application, this Honourable court be pleased to grant an interim injunction restraining the Respondents whether by themselves, their servants, agents and/or assigns or any other person whosoever from headhunting, advertising, carrying out interviews, recruiting, employing and/or appointing a substantive Chief Executive Officer of the Nairobi Hospital to replace the Applicant”.

The Claimant asserts that the said Order was duly served on the Respondents on the same day being Friday 4th December 2020 at 3:52pm through the disclosed email addresses of the 1st Respondent's Advocates firm on record. That however on Monday 7th December 2020, the Respondents wilfully, deliberately, maliciously and in bad faith disregarded this Court's order aforesaid and proceeded to appoint Mr. James Nyamongo as the CEO of Nairobi Hospital thus replacing the Applicant herein. That the 2nd Respondent further personally and contemptuously issued a written inter-office memorandum on the said 7th December 2020 on the appointment of the said Mr. James Nyamongo as the substantive CEO of The Nairobi Hospital. That the said order of the Court which is still valid and in force was couched in plain terms, was unequivocal and clearly addressed to the Respondents, who with representation of Counsel clearly understood the import of the said conservatory order. That the Respondents who had an unqualified obligation to obey the said Court order chose to contemptuously act against the same thus bringing disrepute and disrespect to this Honourable Court. Further, that the Respondents' deliberate contemptuous acts is personally spearheaded by the 2nd Respondent to ensure that the Applicant's main prayer of reinstatement is prematurely defeated, which consequently obstructs this Honourable Court from discharging its duty of dispensing justice. That this Court is enjoined by the Constitution and statute to uphold the sanctity of the law and the administration of justice and that it is therefore imperative that the authority and dignity of this Court is upheld and protected at all times for the maintenance of the rule of law and order. That the proceedings before this Honourable Court will be an exercise in futility and a pure academic exercise unless the orders sought in the instant Application are granted in the interest of justice. The Claimant/Applicant annexes in his Supporting Affidavit copies of the Motion Application and Court Order both of 4th December 2020; copies of the email serving the order on the Respondents' Advocates and the Affidavit of Service confirming physical service; and a copy of the inter-office memorandum issued by the 2nd Respondent.

3. The Respondents filed a Replying Affidavit sworn by the 1st Respondent's Acting Company Secretary, Maxwell Maina who avers that the Claimant/Applicant and his advocates were aware that the process of recruitment of the CEO was underway. That the issue subject of the Order of injunction by this Court on 4th December 2020 was actively the issue before the Court, decided vide Ruling of 13th November 2020 where the Court rejected the application for any injunction on the process of recruitment of the CEO. That the Application dated 4th December 2020 was therefore filed in gross abuse of judicial process and was wholly *res judicata* in so far it represented the issue of injunction. That the Court could not therefore re-hear the issues thereof and issue Orders and that it is evident the Applicant in his Application dated 4th December 2020 concealed and suppressed the material facts of injunction that had already been litigated and dismissed. That the resultant Order of Court of 4th December 2020 was issued as a consequence of fraud and it is trite law that the Applicant cannot therefore obtain any benefit from the same. He further avers that the Application dated 4th December 2020 was a collateral attack on the Ruling of this Court of 13th November 2020 and a disguised appeal and that the Court had no jurisdiction to sit on appeal of its decision. That the Respondents who are persons of high standing in society and with the law did not conduct themselves in any manner that was contemptuous to the Orders of this Court of 4th December 2020 which was served upon their advocates on 7th December 2020. That the said Order was directed at expressly restraining headhunting, advertising, carrying out of interviews, recruiting and employing and/or appointing a substantive CEO, all of which the 1st Respondent had already undertaken when the said Court Order was issued. That the interviews for the CEO were conducted by the Board of Management of the 1st Respondent on 2nd November 2020 as exhibited in annexures MM-1 and MM-2 and that a contract for the employment of the CEO was concluded on 25th November 2020 as shown in annexure MM-3. He clarifies that upon the CEO resuming office, the Respondents have not undertaken any such exercise and there was thus no or willing violation of the Order of 4th December 2020 by the Respondents. He asserts that the Notice of Motion dated 11th December 2020 should be dismissed in the interests of justice and public interest and with costs on indemnity basis.

4. The Respondents filed a second Replying Affidavit sworn on 20th January 2021 by the IT Manager in the law firm of Echessa & Bwire Advocates LLP (Respondents' advocates), Gurion David Mwima, who manages the said firm's office emails. He confirms that the firm received an email with attachments through their office email address on or about Friday 4th December 2020 at 1552 hours, concerning an application and Order of Court. That he had closed for the day by the said time and did not therefore see the said email and all other emails until Monday the 7th of December 2020 when he brought the same to the attention of the attending advocate in the office. He further avers that even though the said email further addressed the attending advocate, Mr. Miller Wanjala Bwire through his office email address, the same was not and could not be received by him because the sender quoted the wrong email address, using bwire@jebadvocates.ocrm instead of bwire@jebadvocates.com

5. The Claimant/Applicant submits that the extracted Court Order was duly served upon the Respondents pursuant to the Civil Procedure (Amendment) Rules, 2020 and Electronic Case Management Practice Directions, 2020. That 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 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 Applicant submits that in view of the foregoing, the Respondents had notice of the order of this Honourable Court of 4th December 2020 by virtue of both the electronic service and physical service and were duly served with the said Court Order and that they are therefore precluded from denying knowledge of the said Court Order. He further submits that the Respondents have also not demonstrated that the filed Affidavit of Service is incompetent in any way whatsoever and he relies on the Court of Appeal case of **Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another [2014] eKLR** in support of this submission. The Applicant further cites **Hadkinson v Hadkinson (1952) ALL ER 567** where Romer L.J. 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. Romer L.J. further stated that 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. That the Court of Appeal further held in **Civil Application No. 39 of 1990, Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another** 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.

6. The Claimant/Applicant submitted that the Respondents ought to have shelved the implementation of their decision to employ the substantive CEO but instead directed and/or allowed Mr. James Nyamongo to report to work on 7th December 2020 in total and obvious disregard of the order of this Honourable Court. He relies on 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 and wherein it was affirmed that that anything done in disobedience of court orders is null and void ab initio and is a nullity in law. The Applicant urged the Court to find the appointment of a substantive Chief Executive Officer by the 1st Respondent and his subsequent confirmation of employment is a nullity and void *ab initio*. That this Court should further refuse to hear the Respondents until the contempt is purged as was similarly done by the Court of Appeal in the case of **A.B & Another v R.B [2016] eKLR**.

7. The Claimant/Applicant submits that the Contempt of Court Act No. 46 of 2016 was declared unconstitutional as per the decision of the **High Court of Kenya in Constitution Petition No. 87 of 2017 Kenya Human Rights Commission v The Attorney General & Another [2018] eKLR**. That 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. That the law currently applicable in England in regard to contempt of court proceedings is Rule 81 of the Civil Procedure (Amendment No. 2) Rules of 2012 which said rule shall thus govern contempt of court proceedings in Kenya. He further submits that the court's power to punish for contempt is inherent, is not granted and cannot be limited by statute and which inherent power is captured under Section 3A of the Civil Procedure Act. That it is for the foregoing reasons that this Court has the jurisdiction to punish for contempt and that the Notice of Motion Application dated 11th December 2020 be allowed as prayed with costs.

8. The Respondents submit that Lord Justice Clerk in the Scottish case of **Stewart Robertson v Her Majesty's Advocate, 2007 HCAC 63**, as referenced to in the case of **Sam Nyamweya & 3 Others v Kenya Premier League Limited & 2 Others [2015] eKLR**, stated that "contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings". The Respondents submit that it is trite law that failure by any party to make full disclosure of material facts that are known to them is a basis to have an Order recalled and set aside. That the Court of Appeal in **Civil Appeal No. 210 of 1997 Bahadurali Shamji v Alnoor Jamal & 2 Others [1998] eKLR** quoted

with approval the dicta by Warrington LJ that a person who makes an *ex-parte* application to court has to make the fullest disclosure of all material facts within his knowledge, failure of which he cannot obtain any advantage from the proceedings and will be deprived of any advantage he may have already obtained. They submit that since the Applicant in the instant case is guilty of material non-disclosure of the facts within his knowledge, he cannot and indeed should not be allowed to profit from his wilful deception of this Court. It is their submission that the Order dated 4th December 2020 ought to be vitiated forthwith for being obtained through fraud. The Respondents further submit that the Court in **Kasembeli Sanatte v Manhu Mtadi alias Fredrick Sanatne & 4 Others [2013] eKLR** affirmed that the burden of proof in contempt of court proceedings is beyond reasonable doubt. It is their submissions that the actions seeking to be enjoined by the Order dated 4th December 2020 having already occurred prior to 4th of December 2020, it would be inconceivable and blatantly against the law for them to be cited for contempt of the said Order. That therefore neither of the alleged Contemnors have in any way wilfully disobeyed the Court's Order as wrongly alleged or at all and that the aspect for which the Applicant claims contempt relates to actions committed prior to the issuance of the very order. They thus submit that the Applicant has not discharged the burden of proof that the alleged Contemnors acted in wilful disobedience of Court Order while they have clearly demonstrated that the present application and the order sought herein have been overtaken by events. The Respondents urge the Court to dismiss the Application dated 11th December 2020 with costs to them.

9. An allegation of contempt of court is a serious one since if proved, would greatly undermine the authority of the court. It is therefore imperative that the Court gets to the bottom of the matter and determine if the Court orders were wilfully disobeyed. In the case of **Tribe Hotel Ltd v Josphat Cosmas Onyango [2018] eKLR**, the Court of Appeal while setting aside contempt orders and allowing the Appeal, held 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 vs. 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.”

As it stands, the Claimant approached the Court and concealed material facts well within his knowledge as he had sought to injunct the process of recruitment and failed to do so. Vide a Ruling issued on 13th November 2020 where the Court (Onyango J.) rejected the application for any injunction on the process of recruitment of the CEO holding that *“I do not think it would be logical in the circumstances, to force the Claimant and the Chairman to work together. The balance of convenience would thus militate against granting orders of injunction.* The Court having declined to grant the injunction, it could not be open to the Claimant to seek the same and in doing so without revealing the orders he had failed to obtain, the Claimant practiced deceit and thereby obtained the orders of 4th December 2020 by concealing material facts. The motion by the Claimant is thus devoid of merit and is accordingly dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2021

Nzioki wa Makau

JUDGE