



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. E021 OF 2021**

**IN THE MATTER OF ARTICLES 22, 23(1) & (3), 35, 41, 47 AND 162(2)(a) AND 236 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 7 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

**AND**

**IN THE MATTER OF SECTION 45 OF THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF SECTIONS 3, 4 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF SECTION 76(2) OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012**

**AND**

**IN THE MATTER OF SECTION 10 OF THE COUNTY ASSEMBLIES POWERS AND PRIVILEGES ACT, NO. 6 OF 2017**

**BETWEEN**

**ELIZABETH ALILA OCHAYE.....PETITIONER**

**v**

**COUNTY GOVERNMENT OF MIGORI.....1<sup>st</sup> RESPONDENT**

**GOVERNOR MIGORI COUNTY.....2<sup>nd</sup> RESPONDENT**

**RULING**

1. Elizabeth Alila Ochaye (the applicant) was nominated and appointed as a County Executive Committee member for Trade, Tourism and Co-Operatives by the Governor, County of Migori (the Governor)(the applicant was moved to the Ministry of Environment, Natural Resources and Disaster Management in 2019).
2. On 5 March 2021, the Governor issued a show-cause to the applicant. The applicant was given 30 days to respond to the allegations.
3. At the same time, the Governor notified the applicant that she had been reassigned to the Department without Portfolio.
4. The next day, the applicant's medical cover was removed on the instructions of the Chief Officer, Public Service.
5. A Special Disciplinary Committee was established, and on 25 March 2021, its chair invited the applicant to appear before the Committee on 9 April 2021 for a hearing.

6. On 7 April 2021, the applicant moved the Court under a certificate of urgency seeking a myriad of interdicts, and when the Motion was placed before the Court ex-parte on 8 April 2021, the Court ordered as follows:

(i) ...

(ii) THAT the application together with the Petition will be disposed of together by way of written submissions in view of the similarity and overlapping nature of the orders sought.

(iii) THAT the applicant is directed to serve the Respondents forthwith, and the Respondents directed to file a response within 21 days.

(iv) THAT the applicant shall have leave to reply if necessary, which reply will be filed together with submissions within 14 days of service by the Respondents.

(v) THAT the Respondents shall file submissions within 14 days of being served with the Petitioner's submissions.

(vi) THAT mention on 8 June 2021 to confirm compliance and to take a date for highlighting.

(vii) THAT in the meantime status quo obtaining as of today 8 April 2021 be maintained pending further orders of the Court.

(viii) THAT hearing/mention shall be in Kisumu ELRC.

7. The Governor filed Grounds of Opposition and replying affidavit on 27 April 2021. The County Secretary filed a replying affidavit on behalf of the County Government on the same day.

8. On the same day, the Respondents filed a Motion under a certificate of urgency seeking an order excluding from the record certain documents which had been filed by the applicant on the ground that she had obtained them illegally.

9. The Court directed the Respondents to serve the Motion with mention set for 18 May 2021 to give directions.

10. However, on 12 May 2021, the applicant filed another Motion seeking to cite the Governor for contempt of court. It was alleged that the Governor had, despite the *status quo* order of 8 April 2021, terminated the applicant's appointment. It is this contempt application that the Court is confronted with.

11. Pursuant to leave granted on the applicant filed a Supplementary affidavit on 20 May 2021 to introduce a letter dated 13 April 2021, which had informed her of the termination of her appointment.

12. On this latter date, the Court set timelines for the Petitioner to file and serve replies ahead of further proceedings on 24 May 2021.

13. The Governor filed a replying affidavit in opposition to the contempt application on 24 May 2021 (the Governor filed his submissions thereto on 25 May 2021).

14. The County Secretary filed a replying affidavit on behalf of the County Government on 26 May 2021.

15. The applicant filed her submissions on 31 May 2021.

16. The ingredients that a party alleging contempt should prove are trite, and the Court will not rehash them in this Ruling.

17. In the Court's view, the allegation of contempt will fail or succeed upon a determination of what was the *status quo* on 8 April 2021.

18. The applicant asserted that the order of *status quo* given on 8 April 2021 enjoined the continuation of the disciplinary process and termination of the appointment.

19. In taking that view, the applicant cited the Court of Appeal authority of *Shimmers Plaza Ltd v National Bank of Kenya Ltd* (2015) where the Court stated:

Status quo in normal English parlance means the present situation, the way things stand when the order is made, the existing state of things. It cannot, therefore, relate to the past or future occurrences or events. We fail to see what can be ambiguous about that order. All it meant was that everything was to remain as it was at the time that order was given. If there was any transaction of whatever nature that was going on in respect of the land question, it had to freeze and await the discharging of the Court order. The agreement of sale may have been signed prior to that date, but once the court ordered maintenance of *the status quo*, everything else had to wait.

20. The Respondents had a different view of the meaning and effect of an order of *status quo*.

21. In the Respondents view, the *status quo* order meant that they were allowed to proceed with the disciplinary process because the Court had not issued any injunctive order.

22. To buttress the contention, the Respondents cited the decision of the High Court in Mombasa High Court Misc Civil Cause No. 11 of 2012, Baobab Beach Resort that:

an order of status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at an interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or *prima facie* case... An order of status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order of *status quo*.

23. The Respondents also defended themselves on the ground that the Governor was not served with the *status quo* orders because they were not familiar with the email addresses purportedly used to serve.

24. This Court must confess that orders of *status quo* have been open to different interpretations with the attendant confusion on what the parties ought to refrain from or proceed.

25. *Status quo* is a Latin term which loosely translates to the *existing state of circumstances*. The order is ordinarily issued to maintain an existing situation. It binds both a Claimant and a Respondent not to alter the existing situation.

26. The situation which obtained on 8 April 2021 was that the disciplinary proceedings against the applicant were ongoing as a show-cause had been issued and an invitation to an oral hearing extended to the her.

27. In this Court's understanding, by directing that the *status quo* be maintained, the Court was allowing the disciplinary proceedings to proceed. Otherwise, if the Court intended to interdict the disciplinary process, it would have issued the restraining orders sought by the applicant or ordered *status quo ante* the initiation of the disciplinary process.

28. Consequently, the Court finds that the essentials of contempt have not been proved.

29. The Motion dated 22 April 2021 is dismissed.

30. Costs in the cause.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 1ST DAY OF JULY 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For applicant Amuga & Co. Advocates

For 1<sup>st</sup> Respondent Owino & Mcdowell Advocates

For 2<sup>nd</sup> Respondent Prof Tom Ojienda & Associates

Court Assistant Chrispo Aura