

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. E314 OF 2021

LENA CHEMOIWO.....CLAIMANT

VERSUS

BOMAS OF KENYA LIMITED.....RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 28th July 2021 seeking for Orders that the Honourable Court be pleased to stay, review, and set aside and/or vary its Orders for committal and payment of fine by the Contemnors made on 27th July 2021 to the extent that there was no basis for contempt proceedings in the first instance. The Application is premised on the grounds that the Claimant had withdrawn her application dated 22nd April 2021 after having been overtaken by events and the Respondent's advocate then reached out to the management to tabulate her dues for days worked. The Respondent asserts that the Court thus became *functus officio* to the said application dated 22nd April 2021 immediately the same was withdrawn by the Claimant and that the Claimant by filing the contempt application on the said non-existent application was irregular and mischievous. The Respondent asserts that this Application for review ought to be allowed as the Contemnors believe they acted in good faith and there is no contempt of court or at all. The Applicant further asserts that the Court by not considering the submissions filed by the Respondent/Contemnors in opposing the application for contempt has occasioned hardship and injustice to them. Mr. Jimmy Okidiang for the Respondent/Applicant supports these grounds in his sworn Supporting Affidavit.

2. The Claimant/Respondent filed a Replying Affidavit sworn on 16th September 2021 averring that the Respondent/Applicant is misleading the Court and depones that she only withdrew the said application of 22nd April 2021 on condition that the Respondent's Advocate would undertake to deal with her withheld salaries and the Respondent's denial for her to access work. The Claimant asserts that however when nothing was forthcoming from the Respondent/Applicant despite several correspondence, the same necessitated the institution of the contempt of court proceedings on 15th June 2021 while still awaiting for mention to confirm the settlement on 22nd June 2021. That when parties appeared before Court on 7th July 2021, the Respondent had filed its response to the Contempt application misleading the Court that she had been summarily dismissed from her employment and not addressing anywhere in its response the issues pending as at 8th June 2021. She further avers that the Respondent/Applicant cannot blame the Court for not considering its submissions in the Contempt proceedings since it failed to file the said submissions within the prescribed timelines as directed by the Court. It is the Claimant/Respondent's averment that the argument that the Court was *functus officio* in as far as the Application dated 22nd April 2021 and thus ought not to have been subject of the contempt application is untrue as the said withdrawal was not sanctioned by the Court. She prays the application be dismissed with costs because the balance of convenience tilts in her favour and she continues to be subjected to unfair economic hardships.

3. The Respondent/Applicant submits on the issue of withdrawing an application or pleading that all consequential directions vanished when the Claimant withdrew the application dated 22nd April 2021. The Respondent asserts that the application for contempt has not met the minimum threshold as the Claimant/Respondent did not demonstrate how the Contemnors disobeyed a Court order and which order in particular was disobeyed. That the Court orders the Claimant purported to prosecute and seek contempt against the employees of the Respondent was non-existent. The Respondent/Applicant relies on the case of **Kofinaf Company Limited & Another v Nahashon Ngige Nyagah & 20 Others [2016] eKLR** where the Court borrowed from Allahabad High Court in **Smt Raisa Sultana Begam & Others v Abdul Qadir & Others AIR (1966 ALL 318)** where the Court held that the plaintiff became subject to the bar as soon as he withdrew the suit. That in this case, the Claimant was thus barred from relying on directions issued pursuant to the application dated 22nd April 2021. The Respondent/Applicant also relies on **Nguruman Ltd v Shompole Group Ranch & Another [2014] eKLR** and urges the Court to find that the issue of withdrawal having not been brought to its attention, the application herein for review be granted and the orders finding the Contemnors guilty be set aside in the interest of justice.

4. The Claimant/Respondent submits that the application herein does not meet the threshold for review as under Rule 33 of the ELRC Procedure Rules. That the Respondent/Applicant has not established: the discovery of new and important matter of evidence that was not within its knowledge or could not be produced at the time the order was made; or a mistake or an error apparent on the face of the record to warrant review of the ruling delivered on 27th July 2021. On this submission she relies on the cases of **Sergii Gergel v Arfa Afra Ltd t/a Imax Africa Ltd [2020] eKLR**; **Bethwel Omondi Okal v Managing Director Kenya Power & Lighting Co. [2017] eKLR**; and **Kenya Engineering Workers Union v Steel Structures Limited [2020] eKLR**. She further submits that the Court made the said Orders consciously after proper exercise of discretion and notes that nowhere in its response to the Application for Contempt did the Respondent confirm whether the contempt had been purged. Further, that the Applicant's arguments constitute grounds of appeal and not review. The Claimant/Respondent submits that any person who has committed an act of contempt of court is liable for indictment as held in **Teachers Service Commission v Kenya National Union of Teachers & 2 Others [2013] eKLR**. The Claimant asserts that the Respondent/Applicant is making baseless arguments even before purging the contempt and has therefore not come before this Court with clean hands and that it is trite that Court Orders are not made in vain. The Claimant/Respondent urges this Court to be guided by the authorities cited herein and to uphold the ruling delivered on 27th July 2021.

5. The Respondent/Applicant is seeking a review of the decision of the Court made on 27th July 2021. It is asserted that the Court became

functus officio upon rendering the decision as parties made a compromise. It is argued that immediately the application upon which the contempt application was premised was withdrawn by the Claimant, the filing of a contempt application on the said non-existent application was irregular and mischievous. The Claimant counters that the Court did not become *functus officio*. The Court issued orders which the Claimant sought to enforce by seeking various reliefs against the Respondent and upon the Court hearing the parties issued the following order:-

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.

6. The contempt having been established it is not open for the Respondent/Applicant to suggest the Court became *functus officio*. *Functus Officio* is defined in **Black's Law Dictionary Tenth Edition** as **having performed his or her office, (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished**. The Respondent would be right to argue the Court is *functus* if the Court were to rehear the matter. What the Court was doing and continues to do is ensure compliance with a lawful order issued by a competent Court. For that the Court cannot be *functus* unless the related doctrines of *issue estoppel* and *res judicata* apply. None of these have been invoked as the reason the Court has no power to deal with the matter as it did. The consent of parties did not obviate the necessity to comply with the Court order as held in my decision of 27th July 2021. The upshot of the foregoing is that the motion by the Respondent/Applicant is devoid of merit and is hereby dismissed with costs to the Claimant/Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2021

NZIOKI WA MAKAU

JUDGE