



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.37 (N) OF 2010

AGNES MUTHONI & 34 OTHERS.....CLAIMANTS

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE (KEMRI).....RESPONDENT

AND

UNION OF NATIONAL RESEARCH AND ALLIED

INSTITUTES STAFF OF KENYA (UNRISK).....INTERESTED PARTY

RULING

The ruling herein relates to two applications one filed by the respondent, Kenya Medical Research Institute (KEMRI) dated 14th October, 2021 and application filed by the claimant dated 1st November, 2021.

The respondent in application dated 14th October, 2021 is seeking for orders that;

- a) This court be pleased to issue an order staying the execution and/or enforcement of the Ruling and Orders of ... delivered on 14th October, 2021 together with any other consequential orders arising therefrom, pending the hearing and determination of respondent's intended appeal to the Court of Appeal.*
- b) This court be pleased to issue any orders to meet the ends of justice*
- c) The costs of this application be provided for.*

The application is supported by the Supporting Affidavit of Prof. Samuel Kariuki and on the grounds that the claimants are former employees of the respondent upon termination of employment on 17th December, 2009 and by ruling dated 14th October, 2021 the court allowed the claimants to return to work but failed to consider that the court had no jurisdiction to order for the re-engagement, deployment and resumption of duty without loss of status with effect from 18th October, 2021 as the such order is time barred under section 12(3)(vii) of the Employment and Labour Relations Court Act, 2011. The court failed to consider and make a determination on the impracticability of an order of the claimant's re-engagement, deployment and resumption of work after 11 years after termination of employment. The court is barred by the doctrine of *functus officio* from making an order for the payment of the claimants' salaries from 17th June, 2015 to date since such order was not part of the judgement.

That the ruling is contradictory after the court held that there was no order of back payments yet directed all salaries be paid. The court further ordered for the release of Ksh.200, 000 deposited in the Cooperative Bank Limited together with accrued interests is otiose and incapable of enforcement as no such account exists.

The respondent is aggrieved by the ruling of the court and wishes to file an appeal and the application is filed without undue delay.

In his Supporting Affidavit, Prof. Samuel Kariuki avers that he is the Acting Director General of the respondent herein and with authority to support the instant application. He avers that the claimants filed application dated 3rd December, 2020 seeking for orders of re-engagement without loss of status, salary and back pay and for the security deposit issued for stay of execution pending the hearing of the appeal be released. By ruling delivered on 14th October, 2021 the court directed the respondent's director Dr. Yeri Israel Kombe to re-engage the claimants and to allow them back to work without loss of status as held on 17th December, 2009 and to report on duty on 18th October, 2021.

Prof. Kariuki avers that the respondent is aggrieved and seeks to appeal against the ruling of the court and support the application filed in this regard.

The claimants filed application dated 1st November, 2021 seeking for orders that;

1. Spent

2. That the Claimant/ Applicant be granted leave to institute contempt of court proceedings against the Acting Director General of the

Respondent, herein namely Prof. Samuel Muriuki.

3. That Summons to be issued against the Acting Director General of the Respondent namely Prof. Samuel Muriuki herein to appear before this Honourable court and show cause why he should not be committed to civil jail for such term and/ or fined for contempt of court for such sum as the court may deem fit and just.

4. That the Acting Director General of the Respondent namely Prof. Samuel Muriuki herein be committed to civil jail for a term of six (6) months for contempt of court for having deliberately and blatantly

disobeyed orders of this court issued on 14th October 2021 and served upon him.

5. That the Respondent and the Acting Director General of the Respondent namely Prof. Samuel Muriuki herein be compelled to personally pay the sum of Kshs. 1,000,000 million for contempt of court and such other daily sum the court may deem fit and just, until and unless the contempt herein is purged.

6. That the Claimants herein be at liberty to execute for the payment of

their basic salaries due from 15th June 2015 to 18th October 2021 and thereafter be at liberty to execute for payment of their gross monthly salaries as and when they fall due at the end of each month upon the lapse of the 30 days stay issued by this honourable court.

7. That this Honourable Court be pleased to issue any other or further orders of the court geared towards protecting the dignity and authority of the court.

The Application is based on the grounds that the Respondent has deliberately disobeyed the orders of this court issued 14th October 2020 despite having been served with and aware of the said orders and that there is sufficient reason for this court to exercise its legal constitutional authority by punishing the Respondent for contempt of court.

The Application is supported by the supporting Affidavit of **GARLAND BIKO LIVONDO**, who avers that he has the authority and consent of the other 33 Claimants to swear this Affidavit. The Claimants filed claim on 19th February, 2010 and on 13th May, 2010 the court delivered judgement in which the Respondent was directed to unconditionally reinstate all the 35 Claimants who had lost their jobs unfairly with immediate effect. The Respondent has since then moved several courts on more than 5 occasions and obtained various stay orders in a bid to circumvent the implementation of the aforesaid award.

On 14th October 2021 this court issued orders directing the Respondent to unconditionally reengage and redeploy all the Claimants. The Respondent was also ordered to tabulate and pay the claimants basic pay from 15th July 2015 to date and make payment thereof within 30 days and for the immediate release of security for costs of ksh. 200,000 to the Claimants' advocates.

The Respondent has however disobeyed the said orders.

Mr Livondo avers that despite being served with the orders the Respondents have deliberately disobeyed the same by not allowing the Claimants to resume duty. The Claimants' advocates on record also wrote a letter to the Respondent's advocates beseeching them to advise their client to obey the court orders to no avail and have declined to sign the letter addressed to the bank for the release of the funds held as security for costs.

The Respondent has been buying time to comply so as to try and circumvent the court orders herein and to further delay the enjoyment of the fruits of the judgement delivered more than 10 years ago and in the interest of justice that the Respondents Director General be committed to civil jail for a term of six (6) months for contempt of court for having deliberately disobeyed court orders.

In reply, the respondent filed the Replying Affidavit of **PROF. SAMUEL KARIUKI**, the Acting Director General and who avers that the Application by the claimants lacks merit as they have failed to satisfy the required threshold for me to be found in contempt.

The Respondent further states that it is on record that on 3rd December 2020; the Claimants sought various orders which were specifically against the former Director General of the Respondent, Prof. Yeri Kombe. That on 14th October 2021 this Court made orders specifically against the said former Director General, **Prof. Yeri Kombe** and not against the affiant herein, **PROF. SAMUEL KARIUKI**. That the terms of the Order of 14th October 2021 are not binding on the affiant since he has not been expressly named and identified as the person obligated to comply with these orders. The terms of the Order of 14th October 2021 do not bind the office of the Director General of the Respondent.

Prof. Kariuki avers that the terms of order No. 3 of this Court's Order of 14th October 2021 are unclear and ambiguous. In relation to order No. 4 of 14th October 2021, he cannot be held in contempt as the bank account was opened in the names of the Respondent's advocates and the Claimants' advocates, at Ecobank Kenya Limited and not with Cooperative Bank Limited. That contrary to the averment by the Claimant, no correspondence whatsoever has been sent by the Claimant's advocates to the Respondent's advocates for the release of the KShs. 200,000/= deposited into the joint interest earning account. That the Applicants have not attached evidence to prove they reached out to the Respondent's advocates and that there exists no joint interest earning account existed at Cooperative Bank but that if such an account exists the affiant has not been named as the person obligated to comply with the terms of this order.

The Respondent further states that a high standard of proof, of beyond reasonable doubt, applies whenever an order for committal to prison for contempt of court orders is sought because contempt of Court proceedings are quasi-criminal in nature. Further that no procedural fairness will be achieved if the Application is allowed and an order for my committal to civil jail issued as no order has been issued by this Honourable Court in these proceedings which binds the affiant to an obligation for compliance. That the Respondent's applications for stay of execution of the Order of 14th October 2021 are still pending hearing and determination before this Honourable Court and before the Court of Appeal. That accordingly, the instant Application lacks merit and ought to be struck out or dismissed with costs to the Respondent.

The parties made oral and written submissions.

The claimant's counsel submitted that an organisation such as the Respondent acts through its officers and it is its officer who are expected to comply with the orders as the corporate legal entity is in capable of acting on its own and in the case of **John Warungu Wanjeru v Family Bank Limited & 5 others [2021 eKLR]** the court held that;

...In answer to the forgoing contention this court is guided by the case Jones v Lipman & Anor [1962] where it was held that:

'A company may in many ways be likened to a human body. They may have a brain and a nerve centre which controls what they do; they also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

With regard to service of Court orders, the claimants relied on the case of **Dari Limited & 5 others v East African Development Bank & 2 others [2020] eKLR** where the court held that where an order for injunction or prohibition is issued then the same need not be served as so long as the Respondent is aware of them.

On the argument that the impugned orders were not specifically directed at the current director, and are therefore not binding upon them, counsel submits that the law is clear that court orders must always enforced failure to which the rule of law would grind to a halt. He relies on the case of **Republic v Attorney General & 2 others Ex Parte APM Terminals B.V 12015] eKLR** where the court held that orders ought to be obeyed even where a person is not party to the proceedings. The orders though now subject to pending applications of stay and appeal should be obeyed.

The Respondents have wilfully disobeyed the orders of this Honourable court and it is in the interest of justice that the application herein be allowed.

The Respondent through counsel submitted that no order has been issued against Prof. Samuel Kariuki in these proceedings. he has not been expressly named in the impugned Order of 14th October 2021 as the person obligated to comply with the terms therein and that the Order is only directed to the Respondent's former Director, Prof. Yeri Kombe. That as such there is no obligation for Prof. Samuel Kariuki to comply with the orders therein.

The impugned orders do not bind the office of the Director General of the Respondent, whether the same is occupied in an acting capacity or a permanent basis. Counsel relied on the case of **Republic v The Permanent Secretary Ministry of Lands and Housing and Another ex parte Lina Tepkemboi Langat and Others. Eldoret High Court Miscellaneous Application Number 128 of 2005 (unreported)** where the court held that;

... [b] The proceedings for contempt must be considered to be of a criminal nature, involving the liberty of the subject, and the burden of proof accordingly would be beyond reasonable doubt...

[c. Therefore contempt of court being akin to a criminal offence leading to venal consequences i.e. committal to civil jail or imprisonment wherein the person loses his personal liberty then the standard of proof is "beyond reasonable doubt. The individual must have knowledge and the intention to disobey the Court Order and proceeds wantonly, recklessly and deliberately to do so. It is for the foregoing reason that it is essential if not mandatory that the identity and person of the alleged contemnor is disclosed and clearly known. The applicant has not named the District Commissioner who occupied the office when the Court Order was served

on the Executive Officer in the District Commissioner's office. The Court does not know the District Commissioner in office on the material day.

[d] The institution or office by itself is not capable of committing contempt of court; it is the office holder/s who is an individual who may do that. In the premises, there is no respondent in this application as no individual has been named and capable of being cited to answer charges

[F... The consequences of a finding of disobedience being venal, the party who calls upon the Court to make such a finding must show that he has himself complied with the procedural requirements and his failure to so comply cannot be said to be answered by merely saying that the other side was or ought to have been aware of what the order required him to do.

[g] Therefore, the Court finds that there was no personal service of the public servant or officer who may have been in occupation of the office of the District Commissioner at the material time. The fact that the said person is not even named is a clear proof that personal service, which is mandatory, was not effected in this case. "

Counsel also submitted that the Applicant has failed to comply with Rule 81.10(3) of the English Civil Procedure Rules having failed to identify, separately and numerically, each alleged act of contempt including the date of each of the alleged acts as required by this Rule. That the Application is fatally and incurably defective in terms of principles addressed in the case of **Christine Wangari Gachege**, cited above where the court held as follows:

An application under Rule 81.4 (breach of judgment, order or undertaking) now referred to as

"application notice" (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon."

That the threshold for a finding of contempt of court to be met by an applicant. in the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others 2020] eKLR**, the court held that the following elements must be proved before orders for contempt are issued:

- 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.*

Counsel submitted that the Application should be dismissed for procedural unfairness and the applicant's failure to comply with all the four (4) elements of the requisite threshold for contempt of and the fact that the Claimants have not discharged their burden to the required standard of beyond reasonable doubt.

Determination

Both applications shall be addressed together as the basis is the orders issued on 14th October, 2021 directing the respondent to allow the claimant to resume duty and be re-engaged, redeployed and placed accordingly on 18th October, 2021. The respondent moved the court first and asked for orders that there be stay of execution and the claimant then applied seeking to have the respondent's officer be committed to civil jail for failing and refusing to comply with the court orders.

The respondent's application dated 14th October, 2021 is sorely seeking that the orders issued on equal date be stayed pending hearing and determination of the intended appeal. the reasons given are that the claimants are former employees of the respondent and upon termination of employment on 17th December, 2009, by a ruling of 14th October, 2021 the court allowed them to return to work but failed to consider that the court had no jurisdiction to order for re-engagement, deployment and resumption of duty with effect from 18th October, 2021 and for such, the order is statute barred under the provisions of section 12(3)(vii) of the Employment and Labour Relations Court Act and effectively the court is *functus officio*.

Other grounds in support of the application are that the orders sought by the claimants were granted and the court directed the respondent director Dr. Yeri Israel Yombe to re-engage the claimants whereas such person has since left the respondent and Prof. Kariuki is the Ag. Director and thus seek to appeal against the court orders.

An applicant seeking an order of stay of execution of any order or decree of the court must satisfy the conditions and tests under Order 42 and Rule 6 of the Civil Procedure Rules which requires a demonstration that the applicant is likely to suffer substantial loss should the orders sought are not granted; security for the due performance of the court decree is offered; and that there is no delay in filing the application.

Whereas the last test of is aptly met, the respondent has not addressed the first two tests at all. The condition that substantial loss to be

suffered must be demonstrated because this is primary and without it the other tests cannot stand. See **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** and in **Equity Bank Limited v Japhet Kubai Ikiamba & another [2021] eKLR**. as to what substantial loss is, the court in the case of **James Wagalwa & another v Agnes Naliaka Cheseto [2012] eKLR** that;

... the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

The fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss.

The respondent has therefore failed this primary test. No matter exists as to the nature of loss, substantial or otherwise has been addressed to justify an order of stay of execution.

The grounds outlined in the application and affidavit of Prof. Kariuki may apply in arguing an appeal as these challenge the gist of the orders issued on 14th October, 2021 but fail to address the nature of loss to be suffered where stay of execution is not granted.

The respondent has challenged the order directed at its director, Dr. Yeri Israel Kombe to e-engage, redeploy and allow the claimants to resume duty. With respect, summons ad orders on a corporate such as the respondent is regulated under the provisions of section 20(8) and (9) of the Employment and Labour Relations Act, 2011 in the following terms;

(8) If an order made under subsection (4) is directed to a—

(a) firm or to a body corporate, every partner of the firm, and every director and officer of the body corporate shall comply with the order; or

(b) trade union, employers’ organisation or federation, every official or officer of the trade union, employers’ organisation or federation shall comply with the order.

(9) Where an offence is committed by a firm, body corporate, trade union, employers’ organisation or federation in respect of any order made under subsection (4), every partner, director, officer or official concerned shall be guilty of the offence unless they prove that—

(a) the offence was committed without their consent or connivance;

and

(b) they exercised all due diligence to prevent the commission of the offence.

The respondent is a body corporate and established as a state corporation and the Constitutive legislation the Science and Technology Act, amended to Science, Technology and Innovation Act, 2013 ad its officers act in perpetuity. It is not the person as unlike the officer holding the office of Director of the respondent that is under reference. The person holding such office can change save the office held remain intact.

In this instance the respondent has an acting director in the person of Prof. Kariuki and at the time the judgement passed the respondent’s director was a different person holding the same office. The person of Dr. Yombe has attended and sworn various affidavits as the director and until Prof. Kariuki started acting as director which means a substantive office holding is yet to be named.

Pursuant to section 20(8) of the Employment and Labour Relations Court Act, 2011 cited above, the holder of the office of director of the respondent at this instance is directed in accordance with the ruling of 14th October, 2021.

The substance of the order to reinstate the claimant, re-engage them, re-deeply them and to allow them resume duty is well addressed in the judgement of the court on 13th May, 2010. To go back on the reasoning of the judgement and noting the various orders issued by the High Court, the Court of Appeal and this court on the subject would not support the orders sought of stay of execution.

The judgment of the court stands and is subject of execution. The respondent is bound to comply.

The grounds that the court lacks jurisdiction to direct the respondent to reinstate, re-engage, redeploy or allow the claimants to resume duty on the backgrounds of the orders sought, the judgement put into account and the referenced provisions of section 12 (3)(vii) of the ELRC Act cannot hold. The judgement of the court allowing reinstatement issued on 13th May, 2010 and this is not a new matter to the respondent. There is no compliance and the judgement stands.

The orders seeking the respondent to comply with the judgement of the court is part of its execution. The court is not *functus officio*. The respondent cannot hang on time to avoid compliance thereof. The judgement remains a valid order subject to execution.

The court finds no matter to allow stay of execution and application dated 14th October, 2021 by the respondent is without merit and is hereby dismissed with costs.

For emphasis, the ruling of 14th October, 2021 the respondent is directed. Such order(s) stand.

On the application dated 1st November, 2021 courts punish for contempt to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice.

As aptly submitted by the Respondent's counsel, the court in the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR**, held that the following elements must be proved before orders for contempt are issued:

- 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.*

In the instant case it is not in dispute that the Respondent had had knowledge of the terms of the impugned order as its advocate was in court when the orders were issued. It is also not in dispute that the Respondent has acted in breach of the terms of the impugned orders. To date, the Respondent is yet to comply with the orders of this court issued on 14th October 2021.

The Respondent argues that the terms of orders of this court issued on 14th October 2021 were not clear and unambiguous for two reasons. First it does not name the current acting director General of the Respondent as being personally responsible for the tabulation and payment of the said salary. That secondly, it does not direct the director or the Respondent to carry out such a computation.

It is trite that where a court order is not clear the concerned parties ought to move the court appropriately. The Respondent in the instant case did not do so. Further, the orders issued by this court were clear that the then Chief Executive Officer and director, Dr Yeri Israel Kombe was ordered to re-engage the claimants and allow them to resume their duties without loss of status.

It is also not in dispute that the impugned orders were against the Respondent, KEMRI Medical Research Institute. The court in **Africa Management Communication International Limited v Joseph Mathenge Mugo & another [2013] eKLR** in addressing a similar matter, the court held that;

Given that the 2nd Defendant is a company, the question that arises is how service of an order is to be effected upon a company if the directors of such a company are to be committed for disobedience of such an order. To my mind, in order to hold a corporation with liability for contempt, it is necessary to show that the corporation has been properly served or that service has been dispensed with on the basis that an appropriate officer of the company had knowledge of the order. In the same way, in order to hold the directors of such a corporation personally liable for breach of an order, such directors should be served with the order or it must be shown that they had personal knowledge of the same.

In the instant case, it is not in dispute that the current director, Prof. Samuel Kariuki had knowledge of the orders of this court. Its argument is that the orders were against the former director, Dr Yeri Israel Kombe and not against the Respondent. Such an argument is absurd and cannot hold.

It is clear that the Respondent's conduct of not complying with court's orders issued on 14th October, 2021 is deliberate. The consistent excuse given is that the orders did not specifically name the current director, Prof. Samuel Kariuki. It is not the person of Ag. Director and Prof. Kariuki that is contemplated pursuant to section 20(8) and (9) of the Employment and Labour Relations Court Act, 2011 as the respondent is a body corporate. The clarity of the office of director and officers of the respondent to obey court orders is imperative. To look and the orders in any other manner would be a miscarriage of justice and impede on the Rule of Law.

The upshot of this is that application dated 1st November 2021 is hereby allowed. I find the Respondent's Director and currently a position held by the Ag. Director, Prof. Samuel Kariuki to be guilty of contempt of court of the order orders of this court issued on 14th October 2021. He is to appear in court on 16th December, 2021 for mitigation and sentencing.

Orders of 14th October 2021 remain valid.

And

The court finds no matter to allow stay of execution and application dated 14th October, 2021 by the respondent is without merit and is hereby dismissed with costs.

For emphasis, the ruling of 14th October, 2021 the respondent is directed. Such order(s) stand.

DELIVERED IN COURT AT NAIROBI THIS 10TH DAY OF DECEMBER, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and