



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. 19 OF 2019**

(Before Hon. Justice Hellen S. Wasilwa on 2<sup>nd</sup> January, 2020)

**JOEL ASHIACHI KUSIMBA .....EX-PARTE APPLICANT**

**VERSUS**

**CABINET SECRETARY FOR LABOUR AND**

**SOCIAL PROTECTION.....RESPONDENT**

**AND**

**CHILD WELFARE**

**SOCIETY OF KENYA.....INTERESTED PARTY**

**RULING**

1. The Application before Court is the Ex-parte Applicant's Notice of Motion filed on 18<sup>th</sup> October, 2019. The application seeks orders that:-

***1. Ibrahim Maalim, Shakila Abdalla, Cheryl Majiwa, Doris Kinuthia and Peter Molu Ibrae be found to be in contempt of Court for disobeying the orders that were given by the Court on 8<sup>th</sup> October, 2019 and served upon the Defendant.***

***2. Upon being found to be in contempt of Court, the said contemnors be detained at industrial Area GK Prison in Nairobi or any other prison or rehabilitation facility for a period of six (6) months or for such period and on such terms as the Court may determine.***

***3. Costs of this application be provided for.***

2. The application is premised on grounds that:-

***a) By an application dated 8<sup>th</sup> October, 2019 the Ex-parte Applicant sought number of injunctive reliefs against the Respondent and on the very day the Court issued orders inter alia that the matter be mentioned on 22<sup>nd</sup> October, 2019.***

***b) The Petitioner extracted the order of 8<sup>th</sup> October, 2019 and served upon Ibrahim Maalim, Shakila Abdalla, Cheryl Majiwa, Doris Kinuthia and Peter Molu Ibrae on 9<sup>th</sup> October, 2019 at about 11.30 am together with the application. In addition, the orders of 8<sup>th</sup> October, 2019 were additionally served on the Respondent.***

***c) Upon service of the orders, Ibrahim Maalim, Shakila Abdalla, Cheryl Majiwa, Doris Kinuthia and Peter Molu Obrae went ahead to transact business as board of directors. These individuals have particularly undertaken the following actions:-***

***i. Taken over the day to day operations at the Child Welfare Society of Kenya.***

***ii. Communicated the Respondent's decision to send the Chief Executive Officer of the Interested Party on compulsory leave through her email of 9<sup>th</sup> October, 2019 at 17.58 hrs.***

***iii. Appointed Justus Muthoka, Jenifer Wainaina and Jennings Kiprop as Ag. Chief Executive Officer, Principal***

*Children Officer and Finance Officer III of the Interested Party.*

*iv. Continued to chair Board of Directors meetings, issued directives and prevented members of the Board of Trustees from discharging its functions.*

*d) The contemnors' actions are calculated to embarrass and bring the proceedings into disrepute and ridicule.*

*e) By refusing to heed to the order of 8<sup>th</sup> October 2019 the Respondent and the contemnors have sought and continue to demean the authority and dignity of the Court.*

3. The application is supported by the affidavit of Joel Ashiachi Kusimba, the Applicant, sworn on 18<sup>th</sup> October, 2019 in which he reiterates the grounds set out in the application.

4. He contends that the contemnors met as the Board members and mobilised all staff and asked them whether they wanted to work with the Board of Trustees or the Government. He further contends that the contemnors asked some of its employees to change the locks at the Interested Party's head office to restrict access of persons.

5. In response to the application, the Respondent filed a Replying Affidavit sworn on his behalf, by Nelson Marwa Sospeter, the Principal Secretary of the State Department for Social Protection in the Ministry of Labour and Social Protection, sworn on 8<sup>th</sup> November, 2019.

6. He deposes that the appointees to the Board of the Interested Party constitute the second Board of the Interested Party. He avers that the Board Members have never convened any meetings or conducted official business at the offices of the Interested Party.

7. He avers that the ex-parte Applicant has not produced any evidence/particulars of the alleged violation of the Orders issued on 8<sup>th</sup> October, 2019 and that any act of the Board after service of the order on 11<sup>th</sup> October, 2019 is denied and is of no effect,

8. He contends that there is no evidence that the ex-parte Order was ever served upon each of the alleged contemnors thus the Application is intended to violate the right to fair hearing of the alleged contemnors.

9. He contends that the contempt application lacks merit, is fatally defective and void for there is no substantive motion upon which the ex-parte Court Order issued on 8<sup>th</sup> October, 2019 and which lapsed on 22<sup>nd</sup> October 2019 are founded upon.

10. The Application was canvassed by way of written submissions with each Party filing its submissions.

**Ex-parte Applicant's submissions**

11. The Applicant submits that it is evident from the Affidavit of Service sworn by Willis Agayi on 9<sup>th</sup> October, 2019 that Ibrahim Maalim, Shakila Abdalla, Cheryl Majiwa, Doris Kinuthia and Peter Molu Ibrae were served on 9<sup>th</sup> October, 2019 at 11.30 am. He therefore submits that there was personal service, on the contemnors, of the order issued on 8<sup>th</sup> October, 2019.

12. He submits that upon service of the Order, the contemnors ought to have downed their tools as they were prohibited from transacting business as members of the Society's Board of Directors. He relies on the case of **Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 Others [2015] eKLR** where the Court held:-

*"In the Scottish case of STEWART ROBERTSON VS HER MAJESTY'S ADVOCATE, 2007 HCAC63, Lord Justice Clerk 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 learned Judge further stated that:-*

*"The power of the Court to punish for contempt is inherent in a system of administration of justice and that power is held by every judge."*

13. He submits that the conduct of the contemnors represents a case of where a person in authority has decided to disobey the order of the Court as they learnt of the existence of the orders staying their appointment as members of the interested Party's Board on 9<sup>th</sup> October, 2019.

14. He submits that the contemnors sent the Interested Party's Chief Executive Officer on compulsory leave by an email and they continued to transact business as members of the Society's Interested Party's Board of Directors in disobedience of the orders.

15. He urges the Court not to ignore the contemnors' acts of continuing to transact business as member of the Board of Directors. He relies on the decision in **Republic v Kenya School of Law & 2 others ex-parte Juliet Wanjiru Njoroge & 5 others [2015] eKLR** and urges the Court to maintain the rule of law, authority and dignity of this Court by finding that the contemnors have disobeyed the orders issued in 8<sup>th</sup> October, 2019.

## **Respondent's submissions**

16. The Respondent submits that he has no legal mandate to appoint persons appointed pursuant to sections 7 (1) (a), (b) and (c) of Legal Notice No. 58 of 2014. He submits that the effect of the order in so far as the appointed persons are concerned is null and void *ab initio* and relies on the decision in **Macfoy v United African Company Appeal No. 67 of 1960.**

17. He submits that the order staying the appointment of the Board of the Respondent are orders *in personam* and that the Respondent is the substantive party against whom the orders sought were granted.

18. He submits that upon being served with the *ex-parte* orders, the Respondent stayed the appointment of the persons so appointed by him pursuant to Section 7 (2) of the Legal Notice.

19. He further submits that the persons named in the *ex-parte* Applicant's application dated 18<sup>th</sup> October, 2019 are not parties to these proceedings.

20. He submits that these persons are likely to be adversely affected by this Court's decision. In support of this he relies on the decisions in **David Oloo Onyango v Attorney General [1987] eKLR** and **Kiai Mbai & 2 others v Gichuhi Macharia & another [2015] eKLR.**

21. He submits that the Applicant has not discharged his burden of proof to demonstrate that there was wilful disobedience of the *ex-parte* orders by the Respondent. He relies on the Supreme Court decision in **Republic v Ahmad Abolfathi Mohammed & another [2018] eKLR** where the Court held:-

***“The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she wilfully acted in a manner that flouted the Court Order.”***

22. In conclusion, he submits that the persons named in the application are not parties to these proceedings and as such are not liable to being held in contempt of Court.

23. I have considered the averments of both Parties herein.

24. From the records of Court, on 8/10/2019 this Court granted leave to the Applicant to apply for Judicial Review by way of Certiorari to remove to this Court and quash the Respondent's decision to appoint Abdul Bahari, Shakila Abdalla, Ibrahim Maalim, Cheryl Majiwa, Doris Kinuthia and Peter Molu Ibrae as members of the Board of Directors of the Child Welfare Society of Kenya.

25. In the meantime, the appointment by the Respondent of persons named in the appointments being Abdul Bahari, Ibrahim Maalim, Shakila Abdalla, Cheryl Majiwa, Doris Kinuthia and Peter Ibrae as first members of the Board of Directors of Child Welfare Society of Kenya was stayed with further orders of this Court.

26. It is now the Applicant's contention that contrary to the orders of the Court above, the named persons whose appointment was stayed by this Court on 8/10/2019, have proceeded to transact business on behalf of Child Welfare Society of Kenya.

27. From the affidavit of service filed in Court on 16/10/2019 sworn by Willis Agayi, the person served was the Permanent Secretary, Ministry of Labour. There is no evidence that the alleged contemnors were ever served.

28. The Applicant has listed out the actions undertaken by the said persons after service of the Court orders on the Permanent Secretary.

29. The Applicant avers that on 9<sup>th</sup> October 2017 at 17.48 hours Shakila Abdalla sent an email of the Society's Chief Executive Officer communicating the Board of Director's decision to send her on compulsory leave.

30. That the said person as member of the Board of the Child Welfare Society also communicated to the Society's Bankers – Equity Bank (K) Limited a decision to change Bank Account Signatories to Justus David Muthoka, Sammy Cheruiyot, Jennifer W. Wangari and Bernard Okumu.

31. That they also appointed Justus David Muthoka as Acting Chief Executive Officer of the Society and vide a letter of 9<sup>th</sup> October 2019, directed the Chief Executive Officer of the Society to hand over her office to Justus David Muthoka.

32. The Applicant attached to the application the Board resolution dated 8/10/2019 updating signatories for back accounts signed by the person named to Equity Bank on change of bank signatories.

33. He also attached another letter dated 1<sup>st</sup> November 2019 to the Permanent Secretary, National Treasury authorising opening of a new bank account for the Society.

34. The Permanent Secretary continued to authorise the opening of the new bank account as required on 6/11/2019.

35. There is evidence that though suspended, the Board members continued to act as if in office and made resolutions affecting the Society contrary to the Court order of 8/10/2019.

36. As annexed, the conduct of the alleged contemnor was in direct conflict of this Court's orders and therefore in contempt of Court.

37. I however find the application sought to cite the named persons for contempt is not merited as there is no indication that they were served with the Court order of 8/10/2019 and therefore any action after that was done without knowledge of the Court order. The application for contempt is therefore dismissed.

**Dated and delivered in open Court this 2<sup>nd</sup> day of January, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of**

Ochieng holding brief Rapado for Ex-parte Applicant