



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 114 OF 2019

(Before Hon. Justice Hellen S. Wasilwa 27th February, 2020)

PROSCOVIA VITSENGWA.....PETITIONER

VERSUS

THE CHAIRPERSON KENYA RAILWAY CORPORATION BOARD.....1ST RESPONDENT

THE KENYA RAILWAY CORPORATION.....2ND RESPONDENT

THE MANAGING DIRECTOR KENYA RAILWAY CORPORATION.....3RD RESPONDENT

PUBLIC SERVICE COMMISSION.....4TH RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE.....5TH RESPONDENT

THE ATTORNEY GENERAL.....INTERESTED PARTY

RULING

1. Pending before me for determination is the Contempt of Court Application dated 9th December, 2019 and Amended on 10th December, 2019 filed by the Petitioner under Section 3 of the Civil Procedure Act, Order 40 Rule 3 (1) of the Civil Procedure Rules and seeks the following Orders that:-

1. The Application be certified as urgent and be heard ex-parte in the first instance (Spent).

2. Pending hearing and determination of the Application dated 28th August, 2019, this Honourable Court be pleased to Order the Managing Director Kenya Railways Corporation, to supervise the compliance with, or otherwise the performance of the Order of temporary injunction issued on 3rd September, 2019 by Hon. Lady Justice Hellen Wasilwa, restraining the Respondents from continuing with the advertisement published in the Standard Newspaper on 17th May 2019 announcing 27 vacancies and the subsequent internal advertisement of 5th July 2019 announcing 83 vacancies.

3. The import of the order issued on 3rd September 2019 by Hon. Lady Justice Hellen Wasilwa suspended every process emanating from the advertisement published in the Standard Newspaper on 17th May, 2019 announcing the 27 vacancies at the corporation together with the internal memo of 5th July 2019 that announced 83 vacancies pending hearing and determination of the Application dated 28th August, 2019.

4. The following persons being PHILIP J. MAINGA, the Managing Director and the 3rd Respondent herein and JOSEPHINE MASIBO, the General Manager Human Resources and Administration, in their own behalf and as officials of the Respondent be cited for contempt and punished by way of imprisonment to civil jail and/or be fined by attachment of personal property and until they purge their contempt be denied audience of this Honourable Court.

5. Costs of this Application be provided for.

2. The Application is premised on the grounds that:-

a. On 3rd September 2019, an ex-parte order was issued by Hon. Lady Justice Hellen Wasilwa suspending the advertisement by the Managing Director Kenya Railways Corporation in the Standard Newspaper on 17th May, 2019 announcing 27 vacancies at the corporation and the subsequent internal announcement of 5th July, 2019 announcing 83 vacancies pending the hearing and determination of the Application dated 28th August, 2019.

b. The said Order and a penal notice were duly served upon the Respondents herein.

c. When the Application came up for directions on 18th July 2019 before Hon. Lady Justice Maureen Onyango, a hearing date for both Applications dated 2/7/2019 and 28/8/2019 were slated for 16th October, 2019 and interim Orders extended until then.

d. On 16th October 2019 the matter came up for hearing of the two Applications dated 2/7/2019 and 28/8/2019. The Court was not sitting as the presiding judge was away on official duty. The matter was nonetheless mentioned before the Deputy Registrar who directed that the matter proceeds on 3/12/2019 and the duty Judge extended the interim orders in place.

e. In defiance and utter disregard to this Orders the Respondents have continued with their illegal advertisements of job vacancies, shortlisting of candidates for various positions and hurriedly conducted interviews and even confirmed different persons to various positions at the Respondent Organization in utter disregard of the Orders of this Honourable Court.

f. Unless the compliance with the Orders issued on 3rd September, 2019 extended on 18th September, 2019, 16th October, 2019 and 3rd December, 2019, the Respondents are likely to continue breaching the terms of the aforesaid Court Order.

g. Further and contemporaneous to the foregoing, this Application is brought to vindicate the authority and dignity of this Honourable Court.

h. Unless the said persons are punished by the Court, they will continue in their defiance of the Court's order.

3. The Application is further supported by the Affidavit of **PROSCOVIA VITSENGWA**, the Petitioner herein sworn on 10th December, 2019 in which she reiterates the averments made in the face of the Application.

4. In response to the Application the 1st, 2nd and 3rd Respondents filed Grounds of Objection dated 12th December, 2019 and filed in Court on 16th December, 2019 raising the following grounds:

1. Prayer No. 2 seeking mandatory injunction is misleading and misconceived because:-

a. Lady Justice Wasilwa did not issue an injunction restraining the Respondents from continuing with any act or omission.

b. The said prayer No. 2 is accordingly incompetent to the extent that it seeks mandatory injunctions to compel the 2nd Respondent to supervise orders that have not been made.

c. The mandatory injunction sought in the said prayer is in the nature of final order and cannot be granted as an interim order.

2. Prayer No. 3 seeking to amend the order of 3/9/2019 is incompetent because,

a. The Notice of Motion dated 28/9/2019 sought orders to restrain the interviews and restructuring in question but the court declined to grant the orders on 03/09/2019 and has not granted such orders to date.

b. The Petitioner now mischievously seeks a declaratory order whose effect is to amend the terms of the orders of 3/09/2019 and purport that perfectly lawful acts such as short listing and interviewing were restrained by the order of 3/10/2019.

c. The declaratory orders now sought are final orders and cannot be granted in interim applications or orders.

3. Prayer No. 4 citing the Respondent for contempt is misconceived because,

a. The offense of contempt cannot be created retroactively by amending the order of 03/10/2019 and applying the amended order retroactively to otherwise lawful past events.

b. The Applicant has not pleaded,

i. The specific acts or omissions commanded or prohibited by the wording of the order of 3/09/2019.

ii. The specific acts or omissions allegedly committed or omitted by the 1st, 2nd and 3rd Respondents

violating the prohibitions or commands.

4. The offense in contempt proceedings cannot be created by analogy.

5. The application is bad in faith and calculated to settle the clear road-map directions issued by the Court on 3/12/2019 for disposing the main Petition.

6. There is in force a court order of 5/04/2019 in ELRC No 21of2018. Okiya Omtatah vs- Kenya Railways Board of Directors & 4 others directing the Respondents to proceed with the staff restructuring process.

7. The said Order of 5/4/2019 has not been set aside or varied or nullified.

5. In further response to the said Application the 1st, 2nd and 3rd Respondents filed a Replying Affidavit filed in Court on 10th January, 2020 deponed by **ASAVA KADIMA**, the Human Resource Manager of the 2nd Respondent in which he avers that Mr. Philip J. Mainga, the Managing Director of the 2nd Respondent was not personally served with the Order of 3/9/2019.

6. He further averred that the 2nd Respondent received advice from its then Corporation Secretary that the Orders of 3/9/2019 did not restrain it from proceeding with the interviewing and recruitment process and exercise as the order was not granted.

7. He further contended that the Orders granted on 3/9/2019 did not command and/or prohibit the corporation and/or its officers to commit or omit any act. He confirmed that since the issuance of the said Orders of 3/9/2019 the Corporation Managing Director and the Corporation have not advertised for any vacancies in the dailies or internally and are therefore not in contempt of the said Orders.

8. He maintained that Mr. Philip J. Mainga is a law-abiding citizen and would not do or omit to do any act if commanded or prohibited to do by the Honourable Court.

9. In conclusion, the 1st, 2nd and 3rd Respondents urged this Honourable Court to dismiss the Application with costs.

Submissions by the Parties

10. The Petitioner in her submissions maintained that the Respondents herein are in contempt of the Court Orders issued on 3/9/2019 by proceeding to conduct interviews and proceeded to make substantive appointments in the backdrop of the said Orders and also legal advice from the 2nd Respondent's Corporation Secretary against taking such action.

11. For emphasis the Petitioner cited several Authorities among them was the Court of Appeal decision in the case of **A. B & Another Vs R.B (2016) eKLR** where the Court cited with approval the Constitutional Court of South Africa's decision in **Burchell Vs Burchell, case No. 364 of 2005** where it was stated:-

“Compliance with Court Orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the constitution are fundamental values of our society. It vests the judicial authority of the state in the Court and requires other organs of state to assist and protect the Court. It gives everyone the right to have legal disputes resolved in the Courts or other independent and impartial tribunals. Failure to enforce Court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may impact negatively on the rule of law.”

12. Further reference was made to the Supreme Court decision in the case of **Republic Vs Ahmad Abolfathi Mohammed & Another (2019) eKLR**.

13. The Petitioner further submitted that by proceeding to shortlist, interview and appoint candidates to the positions that were advertised internally and externally, the contemnors were done in contempt of the Court orders of 3/9/2019 and therefore the Respondents ought to be denied audience in this Court until and unless the said Orders are complied with.

14. In conclusion, the Petitioner urges this Honourable Court to allow her Amended Contempt Application in terms of the reliefs sought therein.

Respondents' Submissions

15. The 1st, 2nd and 3rd Respondents on the other hand submitted that there was no personal service of the Orders on the alleged contemnors. The said Respondents' maintain that no evidence has been availed by the Petitioner to prove personal service of the Orders of 3/9/2019. To buttress this argument, the Respondents' cited the Court of Appeal decision in the case of **Woburn Estate Limited Vs Margaret Bashforth (2016) eKLR**.

16. The 1st, 2nd and 3rd Respondents further contend that the Petitioner has failed to prove the basic elements of contempt and therefore urged the Court to find that there were no acts of contempt committed.

17. The Respondents further submit that the Petitioner/Applicant has failed to prove the existence of an order containing terms that prohibit

the actions complained of. It is the Respondents' contention that the instant Application is only meant to derail the hearing of the main Petition and two Applications dated 2/7/2019 and 28/8/2019 on merit.

18. In conclusion, the 1st, 2nd and 3rd Respondents urged this Honourable Court to dismiss the instant Application with costs.

19. I have examined the averments of both Parties. I note that the orders granted by this Court on 3/9/2019 were as follows:-

1. "THAT this application is hereby certified urgent and service is dispensed with and the same is heard ex-parte in the first instance.

2. THAT the Applicant is hereby granted leave for this application to be heard during the current Court vacation.

3. THAT pending inter-partes hearing and determination of this application an interim order is hereby granted suspending the advertisement by the Kenya Railway Corporation Managing Director published in The Standard Newspaper on 17th May 2019 announcing 27 vacancies at the corporation and the subsequent internal advertisement of 5th July 2019 that announced 83 vacancies.

4. THAT the application be served upon Respondent's and be mentioned on 18/9/2019 before Hon .Lady Justice Maureen Onyango for further directions.

20. The said orders suspended the advertisement for various positions that was running at the time. The Respondents have in the Replying Affidavit in opposition of the application dated 10/1/2020 averred that they had knowledge of this order as it was interpreted to them by their then Corporation Secretary as to their own interpretation of the Court order.

21. In **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** the Court held as follows:-

"...the law has changed and as it stands today knowledge supersedes personal service....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary"

22. This position has been affirmed in several other cases including the case of **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2014] eKLR**.

23. The Court order indeed suspended the running advertisement and the import of this was to stall any action emanating from that advertisement process.

24. The Applicant now avers that the Respondents contemnors have in disregard to the order of the Court proceeded with the interviews and subsequent recruitment of the various advertised position, which they are not denying.

25. Blacks Law Dictionary 9th Edition page 360 defines contempt as follows:-

"Contempt is a disregard of, disobedience to, the rules, or Orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

26. The Respondents indeed acted in disregard of the Court orders thus bringing disrespect to this Court.

27. The people cited for contempt are Josephine Masibo and Mr. Philip J. Mainga, the Managing Director herein. The Managing Director Philip Mainga is a party to this case and was therefore was aware of the orders issued by Court through Counsel.

28. However, Josephine is not party to these proceedings at this juncture and was not at the time the orders were granted. I therefore do not find Josephine in contempt as prayed.

29. As for the Managing Director 3rd Respondent herein, I find his actions were in contempt and I accordingly find him guilty of contempt of this Court's orders.

Dated and delivered in open Court this 27th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ndegwa for 1st, 2nd and 3rd Respondent s – Present

Mukua for Petitioner – Present

Miss Mwendwa for Interested Party – Present