



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 194 OF 2019

CLERK, NAIROBI CITY COUNTY ASSEMBLY

PETITIONER

v

SPEAKER, NAIROBI CITY COUNTY ASSEMBLY

1st RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD

2nd RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY OF KENYA

1st INTERESTED PARTY

JUBILEE PARTY OF KENYA

2nd INTERESTED PARTY

HON ABDI HASSAN GUYO

3rd INTERESTED PARTY

HON MAURICE GARI

4th INTERESTED PARTY

HON MARK NDUNGU

5th INTERESTED PARTY

DIRECTIONS/RULING

1. These Direction(s)/Ruling arise from the proceedings of 19 May 2020 when the *Nairobi City County Assembly Service Board* made an oral application to have an Amended Notice of Motion admitted, and that this Court proceeds to issue interim interdicts *ex-tempore*.
2. Before issuing any directives, some brief background may be in order, to put into context the dispute between the parties.
3. On 30 October 2019, my brother Makau J after hearing extensive submissions from the parties gave/adopted a consent order whose effect was to allow the Petitioner/Clerk of the *Nairobi City County Assembly* to resume work unconditionally and to sustain interim conservatory orders issued on 28 October 2019.
4. It appears that the orders were not complied with or were frustrated and on 11 November 2019, the Petitioner filed a contempt application.
5. Makau J heard the parties on the contempt application and objections raised thereto and in a Ruling delivered on 20 December, 2019 directed that the application be heard on a priority basis.
6. Because there were other pending applications on record, on 21 January 2020 Makau J directed the parties to file/exchange responses, affidavits and submissions before highlighting on 5 March 2020.
7. On 5 March 2020, Makau J determined the applications and further directed that submissions on the main Petition be highlighted on 18 March 2020. That was not to be because of the declaration of a public health pandemic (the Petition was at its tail end).
8. Come 14 April 2020, the *Nairobi City County Assembly Service Board* filed a motion under a certificate of urgency seeking mainly the discharge, variation, review and/or setting aside consent orders adopted by the Court on 30 October 2019.
9. The motion was placed before this Court as the Duty Court on 17 April 2020 and the Court directed that it be placed before Makau J who had all along dealt with the proceedings.

10. The Deputy Registrar had the application placed before the trial Court on 22 April 2020, and Makau J gave directions that the motion be served upon the other parties and a date for hearing be fixed on a priority basis.

11. The Court further directed the parties to agree on whether the motion could be determined on the basis of the record and submissions.

12. Nevertheless, around 7 May 2020, the *Nairobi City County Assembly Service Board* filed a fresh motion under another certificate of urgency seeking the same orders as in the application dealt with by this Court on 17 April 2020, and Makau J on 22 April 2020.

13. The Principal Judge, who was serving as the Duty Court on 7 May 2020 certified the application urgent and directed that it be served and be mentioned on 14 May 2020 before the Duty Judge for further directions.

14. When the parties appeared before Wasilwa J (virtually) on 14 May 2020, the Judge noting that Makau J whose orders was sought to be set aside was on leave, directed that the application be placed before the Duty Court on 15 May 2020 for directions (I was on duty on this date).

15. On 15 May 2020, when the file was placed before me, I noted that there were two similar applications by the *Nairobi City County Assembly Service Board*.

16. When the Court raised the issue with the advocate on record, he indicated that there had been an error, and that a Notice to Withdraw the application of 14 April 2020 had been filed and therefore he wished to withdraw the earlier application.

17. Since there was no *Notice of Withdrawal* on record and the other parties did not object, the Court marked the application of 14 April 2020 as withdrawn.

18. The Court then heard from the parties on the application dated 4 May 2020, and because of the nature of submissions made and the type of orders sought, directed the Deputy Registrar to communicate with Makau J to give an indication when he could hear the parties.

19. The Honourable Judge indicated that the earliest he could hear the parties was after resuming from his annual leave (around 15 June 2020), and consequently the file found itself before me again on 19 May 2020.

20. On record was another application, *An Amended Notice of Motion* in similar terms to the motion of 4 May 2020 save that the *Nairobi City County Assembly Service Board* had included a new proposed order directing the County Executive Committee member, Nairobi, the Treasurer, Nairobi City County Government, the Central Bank of Kenya and the National Treasury to permit/recognise a person appointed by the *Nairobi City County Assembly Service Board* as an Accounting Officer/Procedural Officer.

21. The Court heard submissions from the parties and reserved Ruling today.

Admission of Amended Notice of Motion

22. The oral application to admit the Amended Notice of Motion was opposed mainly on the ground that in terms of Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, leave ought to be sought prior to the filing of an amended pleading.

23. The Constitution of Kenya and indeed the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 abhor technical legalism and because the other parties had not filed any formal responses to the earlier applications to set aside the consent orders, and the Court seeing no prejudice to be suffered which cannot be compensated with costs if at all, will allow the Amended Notice of Motion.

Ex tempore Interim interdicts

24. Among the grounds/reasons advanced by the *Nairobi City County Assembly Service Board* in seeking orders at the instant before the other parties were afforded an opportunity to make formal responses were that some of the employees and members of the County Assembly had not been paid their remuneration for over 2 months and that the continued delay to unblock the impasse created by the consent orders of 30 October, 2019 was causing then untold financial misery.

25. This Court has keenly looked at the proceedings from 17 April 2020 where the main issue was the setting aside of the consent orders of 30 October 2019.

26. Some of the reasons/depositions advanced in support of the setting aside of the consent orders, as set in one of the supporting affidavits are that

5. At the time of recording the purported consent, the advocates on record did not have ostensible or other express authority from the instructing client to enter into the consent on behalf of both the 1st and 2nd Respondents and this explains why both advocates immediately ceased acting for them during the pendency of the same.

6.

10. In any event, I know the orders purportedly issued on the 30th October, 2019 and extracted on the same date is not a true reflection of the proceedings on that particular day as the Court did not pronounce itself as reflected in the said orders.

11. The common practice and the law in this Honourable Court is that before a consent order is issued, consent of the parties by way of signing on the proceedings or evidenced in writing to the Deputy Registrar ought to be provided.

12. I know that there is no consent of the parties evidenced in writing on record and none was provided by either of the parties on record or their advocates to the Deputy Registrar.

27. From the excerpts above, it is clear that the *Nairobi City County Assembly Service Board* is relying primarily on both what transpired in Court on 30 October 2019 and the extent and nature of instructions given to the advocates then on record.

28. The question, therefore, begs, in light of the depositions, should a different Court make substantive orders whose effect would be a reversal of consent orders given by a concurrent Court, when even the correctness of proceedings are under challenge?

29. Considering how far the proceedings had gone and the nature of the proceedings and orders on record, and that the trial Court is still in the station albeit on leave and not under any legal handicap, this Court is of the view that it would only be fair and just that the trial Court address and deal with the application(s) on file and all the parties be afforded an opportunity to respond so that the Amended Notice of Motion is dealt with and determined at once.

30. Consequently, the Court orders and directs

(a) The Amended Notice of Motion is admitted.

(b) *Nairobi City County Assembly Service Board* to file/serve submissions (advance copy by email before end of 22 May 2020) before end of 26 May 2020.

(c) The Petitioner and other parties to file and serve responses/grounds of opposition/objections and submissions to the Amended Notice of Motion on or before 29 May 2020.

(d) The *Nairobi City County Assembly Service Board* file any replies/further submissions before 5 June 2020.

(e) The submissions should be in font 12, at least 1.5 spacing and not exceed 5 pages.

(f) The file be placed before the Principal Judge on 8 June 2020 with a view to getting directions as to the earliest date the trial Judge may hear addresses from the parties/give further directions.

31. Costs in the cause.

Delivered through video/email, dated and signed in Nairobi on this 22nd day of May 2020.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Odhiambo/ Mr. Karanja instructed by Muthomi & Karanja Advocates

For 1st Respondent Mr. Diro/Mr. Kokebe instructed by Diro Advocates LLP

For 2nd Respondent Mr. Okatch/Mr. Ashioya instructed by Ashioya Mogire & Nkatha Advocates

3rd Interested Party Mr. Theuri

Court Assistant Judy Maina