



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 216 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER ARTICLES 22, 23 41 AND 47 OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE PROVISIONS OF SECTIONS 43, 49 AND 50 FO THE EMPLOYMENT ACT, 2007

BETWEEN

JACOB OMONDI GUMA..... PETITIONER

VERSUS

EAST AFRICAN PORTLAND CEMENT PLC LIMITED.....RESPONDENT

RULING

The Applicant filed a Notice of Motion on 3rd December 2019 seeking the following orders:

1. That this application be and is hereby Certified Urgent for hearing on priority basis due to the extreme urgency as the Respondent is in violation/contempt of the orders given on 18th November 2019 and extended on 28th November 2019.
2. That leave be and is hereby granted to the Petitioner/Applicant to seek orders to punish the Respondent's Acting (Ag.) Managing Director Mr. Stephen Nthei for contempt of the Court orders given on 18th November 2019.
3. That this Court do punish the Respondent's Acting (Ag.) Managing Director Mr. Stephen Nthei for contempt of this Court's order given on 18th November 2019 by imprisonment for a period not exceeding six (6) month months and/or payment of such fine as the Court deems appropriate in the circumstances of these proceedings so as to uphold the authority and dignity of the Court.
4. That the orders granted on 18th November 2019 be enforced and the purported appointment of the Interested Party to take over the position of the Petitioner as Production Manager be nullified forthwith.
5. That the costs of this application and all proceedings herein and incidental costs be borne by the Respondent in any event.

The application is premised on grounds that:

1. The Petition and application filed on 11th November 2019 were served upon the Respondent on 14th November 2019 and an Affidavit of Service duly filed in Court and the Respondent entered appearance through M/S Marende and Nyaundi Associates advocates who attended Court on 18th November 2019 through M/S Lukoye Advocate who had full instructions from the Respondent and never indicated to court that a 3rd party had been appointed to take over the Petitioner's position.

2. On 18th November this court issued conservatory orders *inter partes* in the presence of the Respondent's advocate restraining the Respondent from appointing anybody to take over the Petitioner's position of Production Manager substantively pending the hearing and determination of the application dated 11th November 2019.

3. The Orders were extracted on the same day and served upon the Respondent's advocates on 18th November at 4.45 pm and upon the Respondent on 19th November at 8.30 am. The Respondent and the advocates were therefore fully aware of the orders given by the Court.

4. The person now purported to have been appointed the Production Manager, Mr. Japheth Ombogo the Interested party herein was the mobile Plant Manager who was two cadres below the Petitioner.

5. While the Petitioner was in office between 31st October 2019 and 6th November 2019, the Interested Party had already been given a contract of employment to take over the Petitioner's position before

the Board's suitability assessment which was on-going.

6. The Respondent has blatantly violated the orders granted on 18th November 2019 by making a substantive appointment of Production Manager to Japheth Ombogo who held a much junior position to the Petitioner through a letter of appointment dated 31st October 2019 which has presumably been backdated in order to correspond with the internal memo issued on 1st November 2010 and to defeat the Court orders given on 18th November 2019

7. The Respondent's acting (Ag.) Managing Director Mr. Stephen Nthei has acted dishonourably with intent of defeating this Court's orders and process and therefore should be punished by this Court for Contempt of Court orders.

The application is supported by the affidavit of Jacob Omondi Guma, the Applicant herein sworn on 3rd December 2019. He reiterates the grounds set out in the application.

The Respondent filed a Replying Affidavit sworn by Stephen Nthei, the Respondent's Head of Finance and Strategy and Ag. Managing Director, on 19th December 2019.

He deposes that when the matter came up on 18th November 2019, the respondent was yet to forward any documentation or response to both the Petition and Application to Counsel, as the Human Resource and Administration Manager was not available.

He deposes that counsel on record for the Respondent had no prior knowledge of the suitability assessments having been done, the appointment of the Interested Party as the Production Manager and the existence of a letter of appointment dated 31st October 2019.

He avers that the position of Production Manager had already been filled by the appointment letter dated 29th October 2019 and received by the Interested Party on 1st November 2019 when it became effective. He avers that the appointment of the Interested Party was made upon him making an application for consideration vide the letter dated 19th October 2019 and the Board of Directors in a meeting held on 25th October 2019 resolved to appoint him to that position.

He avers that the orders issued could not have been implemented having been overtaken by events. He deposes that the Applicant has failed to establish malice against him in respect of court orders issued on 18th November 2019 as they had been overtaken by events.

The Applicant filed a Supplementary Affidavit sworn on 22nd January 2020 where he avers that the Respondent's advocate ought to have known of the alleged appointment. He avers that the appointment was made later and backdated to defeat the Court Orders because if the appointment was made on 31st October 2019 as purported, he would have known about the appointment. He contends that the Interested Party could not have taken his position as at 1st November 2019 as he was in office until 6th November 2019.

The Application was heard by way of oral submissions by counsel for the parties.

Parties Submissions

Counsel Kopere submitted that when the parties appeared in Court on 18th November 2019 the Respondent sought more time to file a Replying Affidavit and there was no indication that the position of the Production Manager had been filled. That the court was informed that the Board sub-committee was considering filling various positions.

He submitted that the Court ordered that the position not be substantively filled and there was no objection to the orders. He submits that they served the order and there was not the slightest indication that the position had been substantively filled until they appeared in Court on 28th November 2019 before Makau J. He argued that the Respondent had filed an affidavit attaching a purported contract issued to the Interested Party on 31st October 2019, before the termination notice had been served upon the Petitioner on 6th November 2019.

He argued that it was inconceivable that the Interested Party would have been appointed to the position of his 2nd tier boss who was still in office. It was his submission that the letter was backdated to defeat the orders of the Court which fundamentally amounts to contempt.

He argued that existence of the appointment ought to have been brought to the attention of the Court. He submitted that the Respondent purported to introduce undated minutes of a meeting held on 25th October 2019. He urged the Court to find that the Ag. Managing Director is in contempt and so was the action to appoint another person in order to defeat court process.

Counsel Mr. Clapton holding brief for Mr. Lukoye for the respondent submitted that when counsel appeared in Court, everything relating to this job had been concluded. He argued that for there to be contempt there must be an order served on the party and the same is disregarded.

He stated that it is not in dispute that there was an order. What is in issue is whether what is sought to be stalled was in existence. It was his position that there was already a substantive appointment. He submitted that the case of **Cecil Miller v Jackson Njeru and Another [2017] eKLR** defined Contempt from the Black's Law Dictionary as disobedience of a court order that is already in existence.

He urged the Court to find that the orders were overtaken by events but counsel who appeared in Court did not know. He urged the Court to dismiss the application.

In rebuttal, Counsel K'opere submitted that if the Head of Human Resource was not present then the legal officer and the Chief Executive Officer were in office and would have been aware of the appointment. He submitted that the Miller case concerned an *ex-parte* order while the present case relates to an *inter-partes* order.

Determination

Upon consideration of the pleadings and submissions by the parties, the issue for determination is whether the Respondent's Ag. Managing Director was in contempt of the Orders issued on 18th November 2019. The Order restrained the Respondent from substantively filling the position previously held by the Petitioner/Applicant as Production Manager pending the determination of the application dated 11th November 2019.

Black's Law Dictionary, 9th Edition at 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.”

Punishment for contempt aims at ensuring that the rule of law and the dignity of the court are upheld as held in **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005] eKLR** where the court cited the decision in **Gulabchand Popatlal Shah & Another, Civil Application No. 39 of 1990 (unreported)**.

When the parties' counsel appeared in Court on 18th November 2019, Counsel Lukoye holding brief for Dr. Nyaundi opposed the prayers sought and requested for 21 days to respond to the application. Counsel Lukoye did not indicate the extent of instructions from the Respondent in respect of the Petition and the Application. No evidence has been submitted to prove that the respondent had not given instructions to Counsel by that date. It is inconceivable that such crucial information which was the subject matter of both the suit and the application for which instructions were given to Counsel, was left out in the instructions.

The Respondent in Paragraph 9 of the Replying Affidavit sworn by Stephen Nthei refers to the Interested Party's Letter of Appointment as one dated 31st October 2019. In paragraph 12, he deposes that the position had been filled vide the appointment letter dated 29th October 2019 and received by the Interested Party on 1st November 2019 when the appointment became effective. Further, at paragraph 17 of the replying affidavit, it is deposed that the appointment was made on 25th October to take effect on 28th October 2019. That letter has not been shown to court. I further note that the internal memo purportedly announcing the appointment of the Interested Party is dated 1st November 2019 when the applicant was still in office as he left on 6th November 2019. By 1st November 2019, the applicant had not been terminated. If it is genuine, he would have received a copy as a member of staff.

Nthei avers at paragraph 18 that though the Interested Party was appointed to the position of Production Manager on 1st November 2019, he did not assume office as the applicant was in office. At paragraph 4 of the supplementary affidavit the applicant deposes that as a top manager in the respondent's organization, he would have known if any changes had been undertaken while he was in the office between 31st October 2019 and 6th November 2019 since the Interested Party (who was purportedly appointed to replace him) was also in office working as the Mobile Plant Operations Manager reporting to the Quarry Operations Manager, who was the one reporting to the applicant. That it is thus inconceivable that the applicant would not have known of the appointment.

The respondent has not denied that the applicant was issued with the letter of termination on 6th November 2019. It is not possible that the Interested Party took office before that date.

In addition to the foregoing, there is no evidence that the Interested Party applied for the position of Production Manager. The application for employment attached by the respondent is not signed and is for the position of Mobile Plant Manager or equivalent position. Did the respondent appoint him to the position of Production Manager even without him applying for the position? Did the respondent act on an unsigned letter?

All these contradictions over the date of appointment bring to question the validity of the averments in the replying affidavit and specifically the averments over the taking over of office by the Interested Party. It is further questionable how the Interested Party took over the position of the Applicant while the applicant was still in office.

This notwithstanding, the Contemnor Stephen Nthei alleges that he was not personally served with the Order issued on 18th November 2019. The Applicant avers that the Order was served upon the Respondent's Advocates and the Respondent on 18th November 2019 and 19th November 2019 respectively.

The Applicant annexed an Affidavit of Service sworn by Godfrey Omondi Oindi on 3rd December 2019 who stated that the order was received by the Secretary at the Legal Department. The averments in the affidavit of service have not been contested by the respondent.

Rule 81.6. of The Civil Procedure (Amendment No. 2) Rules 2012 provides:

Subject to rules 81.7 and 81.8, copies of judgments or orders and any orders or agreements fixing or varying the time for doing an act must be served personally.

Rule 81.8 provides—

(1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—

(a) by being present when the judgment or order was given or made; or

(b) by being notified of its terms by telephone, email or otherwise.

(2) In the case of any judgment or order the court may—

(a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or

(b) make an order in respect of service by an alternative method or at an alternative place.

Counsel for the Respondent was present when the order was made in court thus he was aware of the order. In respect of this, personal service would not be necessary as counsel was aware of the order. Further, the contemnor's position is that at order was overtaken by events and not that he was not aware about the order.

The Court of Appeal in **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** held:

*“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? **We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence.** There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.”*

[Emphasis added]

In **Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR** the Court held:

“It is also notable in this regard that the counsel for the Respondent did appear in Court to defend the said application for contempt of court, and did seek time to pay the decretal sum. It is therefore evident from the pleadings and submissions made that the Respondent was aware of the orders of this Court of 13th July 2016.”

It is therefore my finding that the respondent's Acting Managing Director was aware of the court's orders. Counsel for the respondent was in court when the orders were made and was also served with the extracted order the same day. The respondent was also served the following day through its legal office as averred in the affidavit of service whose contents the respondent has not disputed.

In any event, the respondent's defence to the contempt application is that the orders were overtaken by events as the position had already been filled by the time the orders were made. This means that service of the orders upon the contemnor is not material to the determination of the contempt application. What is material is whether or not the position had been filled by the time the orders were made by the court.

From my findings above, the alleged contemnor is obviously not telling the truth about the date of engagement of the Interested Party which in itself is contempt.

From the foregoing, I find that Stephen Nthei, Acting Managing Director of the respondent East African Portland Cement PLC Limited is in contempt of the orders of this court dated 18th November 2019. I fine him the sum of Kshs.200,000/= or in default to imprisonment for a term of one month.

The said Stephen Nthei is directed to purge the contempt forthwith or risk further prosecution for contempt of the said orders.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE