



**REPUBLIC OF KENYA**

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

**PETITION NO. 65 OF 2020**

**(Before Hon. Justice Hellen S. Wasilwa on 25<sup>th</sup> June, 2020)**

**MORIASI ARABU JOSIAH.....CLAIMANT**

**VERSUS**

**YOUTH ENTERPRISE**

**DEVELOPMENT FUND BOARD.....1<sup>ST</sup> RESPONDENT**

**THE CHAIRMAN, YOUTH ENTERPRISE**

**DEVELOPMENT FUND BOARD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This Ruling is in respect of the Petitioner's contempt application filed on 8/5/2020 and the Respondent's Notice of Preliminary Objection filed on 21/5/2020.

2. The Petitioner seeks the following orders in its application:-

*a. THAT this Honourable Court do find and hold that Youth Enterprise Development Fund Board, the 1<sup>st</sup> Respondent herein, and the Chairman, Youth Enterprise Development Fund Board namely Victor Mwongera, the 2<sup>nd</sup> Respondent herein have committed Contempt of Court Act for disobeying and defying the orders issued by the Honourable Court on 30/4/2020 and dated 4/5/2020 and further that this Honourable does exercise its inherent powers to punish the Chairman of Youth Enterprise Development Fund Board for knowingly and intentionally disobeying the said order.*

*b. THAT the Respondents be denied audience before this Honourable Court till and unless the Respondents purges the contempt by adhering to the Court Order issued by the Honourable Court on 30/4/2020 and dated 4/5/2020.*

*c. THAT the costs of this application be provided for.*

3. The application is premised on grounds that:

*a. On 30/4/2020 the Honourable Court issued orders inter alia staying the decision of dismissing and/or terminating the Petitioner as a Chief Executive Officer pending the hearing and determination of the application dated 29/4/2020.*

*b. The Court Order was duly extracted and served upon the Respondent together with the Notice of Motion filed under Certificate of Urgency, Supporting Affidavit, List and Bundle of Documents and Petition all dated 29/4/2020 and the Hearing Notice dated 4/5/2020.*

*c. The abovementioned documents were scanned and served vide the Respondents emails.*

*d. Despite having been served and having knowledge of the Court Order, the Respondents have blatantly defied the Court Order and instead denied the Petitioner entry by locking his office and confiscating his keys to his office for purposes of performing his duties and responsibilities as the Chief Executive Officer as ordered by the Honourable Court vide the Court Order dated 4/5/2020 and pursuant to clause 3 of the Letter of Appointment dated 21/10/2016.*

***e. The Respondents have blatantly defied the Court Order by taking over possession of the Petitioner's official means of transport provided pursuant to clause 16 of the Letter of Appointment dated 21/10/2016.***

***f. The dignity and authority of the Court be protected at all times.***

4. The application is supported by the affidavit of the Petitioner sworn on 7/5/2020 in which he reiterates the grounds set out in the application.

5. The Petitioner filed a Further Affidavit sworn on 20/5/2020 in which he avers that on 15/5/2020 he attempted to access his office for purposes of performing his duties but was denied access. He further avers that his advocates advised the Respondents' advocates that the Court Orders should be obeyed and that the failure to do so amount to impunity and disrespect of this Honourable Court.

#### **Respondents' case**

6. In response to the application, the Respondent filed a Replying Affidavit sworn by Dr. Victor Mwangera the 2<sup>nd</sup> Respondent's Chairperson, on 20/5/2020.

7. He relies on his affidavit sworn on 11/5/2020 and avers that there is no contempt as alleged by the Petitioner. He avers that the general rule of being denied audience applied only where contempt has been proved and that there is none herein. He further avers that the Respondents have a constitutional right to be heard under Article 50 of the Constitution.

8. He avers that the Order issued and served upon the Respondents on 4/5/2020 stayed the Respondent's decision of dismissing and or terminating the Petitioner as Chief Executive Officer but the Respondents did not make any decision of dismissing or terminating the Petitioner. Therefore, there cannot be any breach of the Order of 4/5/2020.

9. He further avers that the Petitioner served an appointive fixed term contract which lapsed by operation of law on 30/4/2020 thus the Order granted by the Court on 4/5/2020 was not capable of reviving the lapsed contract.

10. He contends that the Petitioner misled the Court by basing his application and Petition on non-existent dismissal or termination. He avers that the fixed term contract having ended there is no employer-employee relationship and it is not possible to reinstate the Petitioner.

11. He contends that there is no material placed before the Court to demonstrate that the Board dismissed or terminated the Petitioner. He contends that the Board's decision was that it would not renew the fixed term contract as such decision is reserved by law for its discretion in consultation with the Cabinet Secretary in charge of Youth affairs. He avers that the Petitioner was given an opportunity to make representations on the renewal of his contract.

12. He avers that as stated in the Boards letter dated 30/4/2020, the Petitioner is free to access the office to collect his belongings and hand over to the current CEO. He avers that the official motor vehicle was retrieved from the Petitioner because at the time, his employment contract had lapsed.

13. He avers that as at the time the Court Order issued on 4/5/2020 was served upon the Respondents, the Petitioner's fixed term contract had lapsed and the Board had already met and resolved not to renew the Petitioner's contract. He avers that he had already issued a letter of appointment on 30/4/2020 to Benson Muthendi to serve as Chief Executive Officer in an acting capacity.

14. The Respondents further filed a Notice of Preliminary Objection on 21/5/2020 on grounds that:-

***a. This Honourable Court lacks jurisdiction to entertain the Petitioner's pending applications filed herein pursuant to the Employment and Labour Relations Court (Procedure) Rules, 2016.***

***b. The orders sought in the Petitioners applications dated 29/4/2020 and 7/5/202 cannot issue by virtue of the said rules.***

***c. The Petitioners applications dated 29/4/2020 and 7/4/2020 are otherwise incurably defective and incompetent.***

***d. The applications dated 29/4/2020 and 7/5/2020 should be struck out in limine.***

15. In response to the Notice of Preliminary Objection, the Petitioner filed Grounds of Opposition that:

***a. The Preliminary objection is incompetent, fatally defective and an abuse of the Court, the same has not raised any point of law.***

***b. The Respondents' Notice of Preliminary Objection dated 20/5/2020 is non-meritorious, and otherwise a tailback to the expedient delivery of justice for it is intended to put in abeyance the due prosecution of the substantive suit herein, which improper practice should be stopped by this Honourable Court.***

***c. The Respondents' Notice of Preliminary Objection dated 20/5/2020 is thus without merit and should thus be dismissed with costs to the Petitioner.***

16. The parties canvassed both the application and the notice of preliminary objection by way of written submissions.

### **Parties' submissions**

#### **Application for contempt**

17. The Petitioner submits that the Board had an occasion to consider the renewal of his contract but instead restrained from granting the renewal and deferred the matter to the new Board. He submitted that the grievances that informed the Board decision were never brought to his attention.

18. He submitted that the irregularity in the Order alleged by the Respondent, the position in law has been that Court orders whether null or void must always be obeyed until set aside. He relied on the South African case of **Tasima (Pty) Ltd v The Department of Transport & 10 Others (449095/2012)**. He further relied on the case **Africa Management Communication International Limited v Joseph Mathenge Mugo & another [2016] eKLR** where the Court held that a party must comply with an order whatever he thinks of such order and that what is important is that such a party has knowledge of the terms of the order. He relied on the Supreme Court Advisory Opinion Reference No. 3 of 2019, **Council of Governors & 47 Others v Attorney General & 3 Others [2019] eKLR**.

19. He maintained that the Respondents have refused to obey the Court orders issued and that such failure does constituted contempt. He submitted that the Respondents have not produced any material to refute the prevailing state of affairs and rebut his submissions that he has been denied access to the office. He argued that in its reply, the Respondents and their advocates adopted a stance that the order cannot be obeyed as it is null and void. He relied on the case of **Wildlife Lodges Ltd v County Council of Narok and another [2005] 2 EA 344** where the Court of Appeal held that a party that knows of an order whether null and void regular or irregular cannot be permitted to disobey it.

20. With respect to the right to be heard, the Petitioner submitted that in **Wilson Sossion v Wycliffe Etole Omucheyi & 40 Others [2019] eKLR** where the Court stated that the order could not be set aside but will remain in force until the contempt is either purged or until the Respondents show why they should not be punished for contempt.

21. He submitted that the position that a contemnor has the right to be heard is untrue and a person who has disobeyed a Court order cannot purport to misconstrue the law and assert that they must be heard. He relied on the case of **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 Others [2018] eKLR** where the Court of Appeal held that the Court has been firm against granting contemnors audience until and unless they first purge their contempt. It is therefore his submission that the Respondents should not be granted audience until the contempt has been purged.

22. He submitted that the Respondents in their Replying Affidavit accepted knowledge of the Order. He submitted that the Courts have held that personal service of Court orders accompanied by a penal notice is a key requirement in contempt of court proceedings and that the Applicant herein complied with those requirements.

23. He submitted that when the matter came up for hearing of his application on 29/4/2020 and 13/5/2020, Ongaya J extended the order and the Respondents' advocates were aware of the same as they attended Court. He submitted that the Courts have held that if personal awareness of the order is demonstrated then the contemnor can be found culpable of contempt. In support of this, he relied on the case of **Basil Criticos v Attorney General & 8 Others [2012] eKLR** and **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**.

24. He submitted that the Respondents have shown disdain of the Court's Order and that they should bear costs of the application.

25. With respect to the contempt application, the Respondents submitted that Article 50 of the Constitution provides that every accused person is entitled to fair trial and that Article 159 of the Constitution provides that the Court must be guided by principles that justice is done irrespective of status. They relied on the case of **Rose Detho v Ratilal Automobiles Ltd & 6 Others [2007] eKLR** where the Court of Appeal held that a Court will not hear an application for his own benefit by a person in contempt unless he has first purged his contempt, there is an established exception to that general rule where the purpose of the application is to appeal against or have set aside on whatever ground the very order disobedience of which has put the person in contempt.

26. They further submitted that a contempt application cannot and ought not to be dispensed of solely on the basis of allegation by the applicant that a party was in contempt. They relied on the case of **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] eKLR**. They further submitted that the Petitioner has not met the standard of proof in contempt application as held in **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR**.

27. In their Supplementary submissions in response to the Petitioner's submissions, the Respondents reiterated their position that there was no contempt of Court and there exists no employment relationship between the parties. Further, the 1<sup>st</sup> Respondent cannot be in breach of the orders of the court as it has neither terminated nor dismissed the Petitioner.

28. The Respondents submitted that in the **Africa Management Communication case**, the Court stated when a party faced with such an application for committal for alleged contempt it is incumbent upon him to defend his position. They submitted that in the **Fred Matiang'i case** the Court of Appeal held that the right to be heard may only be denied in deserving cases, to mean that it is not an absolute rule that a defendant accused of the contempt of court proceedings may not be heard.

29. They submitted that the orders were overtaken by events and relied on the case of **Giant Holdings Limited v Kenya Airports Authority [2010] eKLR** where the Court held that the contract which was the basis of the suit had been terminated by effluxion of time. In conclusion, they submitted that the Petitioner misled the court to the effect that the decision had already been made. They therefore urged the

Court to dismiss the application with costs.

### **Notice of Preliminary Objection**

30. The Respondents submitted that the Petitioners application dated 29/4/2020 is not anchored on the main application. They submitted that the application is brought under Section 16 (3) of the Industrial Court Rules 2012 which were repealed by the Employment and Labour Relations Court (Procedure) Rules 2016.

31. They submitted that Rule 17 (b) of the ELRC (Procedure) Rules provisions on interlocutory injunctions. They further submitted that in accordance with Rule 2 of the ELRC, the Petition ought to have sought substantive orders of the nature sought in the interlocutory application. They submitted that the Court in **Abdi Mohammed Daib v Kenya Ports Authority [2015] eKLR** the Court held that Rule 16 (3) of the Industrial Court Procedure Rules (2016) did limit the jurisdiction of the Court to grant an injunction only to suits where the Applicant has sought an injunction as a relief in the main suit.

32. They submitted that the provisions of Rule 17 (5) is found in the Civil Procedure Rules. They relied on the case of **Francis Muiruri v Bernard Gathuku Ngugi [2007] eKLR** where the Court held that an interim application has to be anchored on an existing suit and that Order 39 of the Procedure Rules talks of "in any suit". They also relied on Rule 2 of the Arbitration Rules 1997, which provides that applications under that Act shall be made by summons in the suit.

33. They submitted that the Petitioner presented his case in a manner that suggests that the Order of 4/5/2020 reinstated his fixed term contract that had lapsed. They submitted that the Petitioner did not seek an order for reinstatement and even if an order for reinstatement would have been sought, this Court would not have had the jurisdiction to grant an ex-parte order for reinstatement in view of Rule 17 (10) of the ELRC (Procedure) Rules. They relied on the decision in **Kenya Union of Sugar Plantation and Allied Workers v West Kenya Sugar Company Limited [2018] eKLR**.

34. They relied on the cases of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1** and Supreme Court decision in **Samuel Kamau Macharia v KCB & 2 Others [2012] eKLR** and submitted that this Court has no jurisdiction to determine the matter.

35. The Petitioner submitted that the court Order of 30/4/2020 have never been complied with. He submitted that this Court cannot hear the Respondents in light of this Court Order which has not been purged or set aside as any determination of the Preliminary Objection would amount to granting audience to contemnors.

36. He submitted that his invocation of the wrong provision of law, section 16 (3) of the Industrial Court Rules 2012 which were repealed, is not in bad faith meant to mislead or cause injury. He submitted that this is a procedural technicality that this Court ought to overlook in light of Article 159 (2) of the Constitution. In support of this, he relied on the decision in **Thomas Ratemo Ongeri & 2 Others v Zachariah Isaboke Nyaata & another [2014] eKLR**.

37. He submitted that the Respondents have deliberately elected to only address this Court on the repealed section and refused to address on the input of section 12 (1), (2), (3), (4) of the Employment and Labour Relations Court Act 2011.

38. He submitted that thus Court cannot be invited to strike out the suit on a mere technicality. He relied on the Court of Appeal decision in **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 Others [2018] eKLR** that justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

39. He submitted that Order 39 of the Civil Procedure Rules and Rule 17 (5) of the Employment and Labour Relations Court (Procedure) Rules are different and that the Civil Procedure Rules are not applicable to the application.

40. In distinguishing the cases relied upon by the Respondent, he submitted that in the **Adam Mohammed Daib case**, the Court in that case proceeded to hear the application on merits and rendered its ruling. He further submitted that in the case of **Francis Muiruri case** the status quo had changed and the applicant had been evicted from the premises.

41. He submitted that Rule 2 of the Arbitration Act is not applicable to this suit as it is neither a commercial dispute nor arbitration proceedings. It is his submission that the Preliminary Objection requires the Court to ascertain certain facts by calling of evidence as no point of law arises. He submitted that the Respondents should bear costs of the Notice of Preliminary Objection.

42. I have examined all the averments of the Parties herein. The Applicant's contention is that the Respondents disobeyed this Court's orders dated 4/5/2020 staying the dismissal of the Applicant herein as Chief Executive Officer of the Youth Enterprise Development Fund (YEDF).

43. The Respondent on the other hand indicate that the orders issued by this Court were incapable of being obeyed as at the time of issuance there was no employer–employee relationship between the Petitioner/Applicant and the Respondent, his contract having expired.

44. The Respondents further aver that they did not make any decision of dismissing on terminating the Petitioner and therefore they cannot be said to have breached the order of 4/5/2020.

45. They aver that the Petitioner had served in fixed term contract which lapsed by operation of the law on 30/4/2020 and thus the order of 4/5/2020 was not capable of reviewing the lapsed contract.

46. From the pleadings on the file, it is evident that the Petitioner disclosed that he had received a letter dated 28/4/2020 from the Cabinet

Secretary indicating the Boards resolution not to review his contract.

47. The Applicant had misgivings about the resolution that determined the non-renewal of his contract hence his decision to seek Court's intervention in resolving the same.

48. This Court well aware of the said position granted the Applicant interim relief staying the decision of the Respondent's not to renew his contract. The import of the orders granted by the Court on 4/5/2020 were to maintain the status quo as at 30/4/2020 at which time, the Applicant's contract had not yet lapsed.

49. The Respondents submitted that they did not do anything in disregard to this Court's orders as the contract had already lapsed.

50. This Court made its orders on 30/4/2020 and at that time the contract had not lapsed yet.

51. The Respondents Preliminary Objection was filed on the grounds that this Court lacks jurisdiction to handle this application under the Employment and Labour Relations Court (Procedure) Rules 2016 amongst other grounds.

52. The main contention by the Respondent is that there was no employer – employee relationship between the Petitioner and the Respondent and therefore this Court's jurisdiction under Section 2 of the Employment and Labour Relations Court Act was not available.

53. On this issue of jurisdiction, this Court has jurisdiction to hear any matter between employees and employer and this jurisdiction begins even during recruitment and after the relationship is severed. The contention that this Court lacks jurisdiction to handle this matter is not therefore justifiable.

54. The Respondent also pointed out that the application in Court was incurably defective because the wrong sections of the law were cited by the Applicants.

55. On this issue, I refer to this Court's previous decision in **Crown Paints (K) Limited vs Dry Associates Limited (Supra)** where the Court in agreeing on the defect by filing an application under the wrong provisions of the law nonetheless found that that was a mere technicality to be overlooked for the sake of substantive justice pursuant to Article 159(2)(d) of the Constitution of Kenya.

56. This was the same finding by the Court of Appeal in **Martha Wangari Karua vs. IEBC & 3 Others** (supra) and in **Janet Syokau Kaswii vs Kathonzweni Financial Service Association** (supra).

57. The submission by the Respondent therefore that the application should fail on account of reference to wrong provisions of the law as opposed to substantive justice fails.

58. The upshot of my finding is that the Preliminary Objection as raised has no merit and I dismiss it.

59. As to the application for contempt, the Respondent admit they were served by this Court's orders made on 30/4/2020. The order did not reinstate a dismissed employee as forbidden by Rule 17(10) of the Employment & Labour Relation Court (Procedure) Rule 2016.

60. The import of the Court order was to maintain the status quo by staying the decision made not to review the Applicant's contract and therefore not dismissing him.

61. As indicated above, the contract had not terminated on 30/4/2020 and so the Court forestalled the lapse of this contract.

62. The Respondents have submitted that they found the order of Court incapable of being implemented.

63. The law on contempt is clear that the Respondent cannot plead incapability of enforcement of Court Orders as held in **African Management Communication International Limited vs Joseph Mathenge and Another (2016) eKLR** where the Court held as follows:-

*“to my mind therefore, a party must comply with an order whatever he thinks of such an order. What is important is that is that such a party has knowledge of the terms of the order. To my mind, if the Defendants were unsatisfied with the Order of 13<sup>th</sup> June, 2013, they should have attempted to get rid of the same through the proper course that is, either by setting it aside or through appeal. So long as the injunctive order exists, the Defendants are bound to obey the same to the letter”.*

64. The order made by this Court however difficult, it may seem to implement, the Respondents treated the said order casually and even denied the Applicant access to his office amongst other actions as cited by the Applicants.

65. My finding is that the Respondent treated this Court's order contemporary and are therefore liable to being punished.

66. Costs in the cause.

**Dated and delivered in Chambers via zoom this 25<sup>th</sup> day of June, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Obae holding brief Omogeni for Applicant – Present

Kashindi for Respondent – Present