



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 363 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 11th June, 2020)

DANIEL OTIENO OKUN.....CLAIMANT/APPLICANT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

RULING

1. Pending before me are two applications filed by each party herein. The first application is the Claimant's Notice of Motion dated 3/4/2020 seeking the orders that:-

1. Spent.

2. The Honourable Court does find that the Respondent is in contempt of this Honourable Court's ORDER made on 30/3/2020.

3. The Respondent's Vice Chancellor namely Professor Paul Kuria Wainaina be detained in prison for a period of six (6) months or for such period as this Honourable Court shall deem necessary for being in disobedience of the Orders of this Honourable Court given on 30/3/2020.

4. In addition to or in lieu of the committal of the Respondent's Vice Chancellor namely Professor Paul Kuria Wainaina to civil jail, the Honourable Court be pleased to order payment of damages and sequestration of the properties of the Respondent, herein , for disobedience and/or non- observance of the orders of this Honourable Court given on 30/3/2020.

5. The Respondent's Vice Chancellor be directed to immediately release ALL illegally and contemptuously confiscated household property of the Claimant/Applicant in their original state and be condemned to pay for all damaged and missing items.

6. The Office Commanding Station, Kasarani Police Station, is directed to assist in enforcement of the Court order herein.

7. Costs be provided for.

2. The application is premised on grounds that:

1. The Respondent through its Vice Chancellor, namely Professor Paul Kuria Wainaina, his servants and/or agents are contemptuous of the institution of the Judiciary having defied the Hon. Chief Justice's public declaration and direction on stay of all execution during this rapidly evolving public health crisis associated with Covid-19 disease.

2. The Respondent through its Vice Chancellor, namely Professor Paul Kuria Wainaina, servants and/or agents are guilty of disobedience of the Orders of the Honourable Court made on 30/3/2020 and continue in such disobedience for the benefit if the Respondent.

3. The Respondent was duly served through its advocates on record and the Respondent's Vice Chancellor, Professor Paul Kuria Wainaina , who was personally served (via e-mail) with the Court order issued on 30/3/2020 but has continued to defy the same.

4. The contumacious conduct of the Respondent's Vice Chancellor and his officers and or agents disrespects the Honourable Court and brings administration of justice to disrepute and embarrassment.

5. Unless the Respondent and its Vice Chancellor, Professor Paul Kuria Wainaina, are punished for the defiance, they will continue to disobey the said Court Order and thus continue to lower the dignity of this Honourable Court and threaten the life and security of the Claimant/Applicant including the constitutional rights and protection of the child.

3. The application is supported by the affidavit of the Claimant sworn on 3/4/2020. He depones that on 31/3/2020 his advocates personally served the Respondent's advocates with the Order issued by the Court and further emailed the Order to the Respondent's advocates. He further depones that the Vice Chancellor was also served in person vide his email address.

4. He depones that on 1/4/2020 the Vice Chancellor, sent his agents and hooligans to the premises led by Prof. Fatuma Chege and Mr. Ndwiga, the Director of Security who ransacked his house and took away all his household property. He avers that he confirmed to the Respondent's officers the existence of the Order and directly served Mr. Ndwiga with a stamped copy of the order. He avers that the Vice Chancellor has personal vendetta against him.

5. In response to the Application the Respondent filed a Replying Affidavit deponed by **PROF FATUMA CHEGE**, its' Deputy Vice Chancellor (Administration) on 9/4/ 2020 in which she avers that the Respondent did close its offices with effect from 17th March, 2020 due to the Covid-19 pandemic and therefore the ex-parte Order of 31st March, 2020 did not come to its attention.

6. It is therefore the Respondent's contention it is not in contempt of this Court's Orders issued on 31/3/2020 owing to the fact that it had scaled down its operations and the orders of 31/3/2020 served on it via electronic mail.

7. The Respondent further avers that contempt proceedings are quasi-criminal in nature and therefore he urges this Honourable Court to exercise its discretion cautiously. The Respondent urges this Honourable Court to dismiss the Contempt Application with costs to the Respondent.

8. The Claimant filed a Further Affidavit to the Respondent's Replying Affidavit sworn on 21/4/2020. He avers that the Prof. Fatuma Chege is not deserving of the court's audience as she led a group of Respondent's senior officials and hooligans to supervise her illegal and contemptuous eviction contrary to the Court's Order.

9. He avers that the chronology of events and evidence of service can be construed from his Supporting Affidavit and that the Order was physically served upon the Respondent's advocates on record on 31/3/2020. He avers that his advocate did contact the Respondent's advocate via WhatsApp and also copied the Court in the email forwarding the Orders.

10. He further avers that he personally served the Respondent with a copy of the Order on 1/4/2020 at 6.45 am when they went to his house to commence the illegal evictions. He contends that there is no allegation that he had not complied with his part of the Order as he religiously paid his rent and utility costs as directed.

11. The second Application is the Notice of Motion Application dated 9th April, 2020 filed by the Respondent herein under the provisions of Section 12 (3) & 16 of the Employment and Labour Relations Court Act, Rules 17 & 28 of the Employment and Labour Relations Court (Procedure) Rules, 2016 seeking the following Orders that:-

1. Spent.

2. The Honourable Court be pleased to schedule this Application for directions on 15th April, 2020 alongside the Claimant's application dated 3rd April, 2020;

3. That this Honourable Court be pleased to set aside the ex-parte orders issued on 31st March, 2020 by the Hon. Wasilwa J.

4. The Costs of and incidental to this Application be provided for.

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

a) **The Claimant was dismissed from the Claimant's employment on 30th May, 2019 for sexual harassment of a female student. According to the Respondent's staff housing policy, he was required to leave the Respondent's house within a month i.e by 30th June, 2019.**

b) **Simultaneous with filing this suit, the Claimant filed an application to allow him continue to leave in the house pending the determination of the suit. However, and importantly, the Claimant withdrew the Application before Hon. Onesmus Makau J. on 18th June, 2019.**

c) **Nevertheless, the Claimant refused to leave the house since June 2019, without paying rent. This prompted the Respondent to seek to evict him in November 2019. The Claimant filed another application, similar to the previously withdrawn one.**

d) **Purely on compassionate grounds, Radido J. gave the Claimant a limited time period within which to vacate the premises, subject to paying the rent from the date of his order until he vacates, as well as agreeing to settle the accumulated rental arrears from June 2019. To date, the Claimant has refused to settle those arrears.**

e) *The Claimant concealed the above background from this Honourable Court when he approached it on the 30th March, 2020. To compound the Claimant's egregious conduct, he sought to take advantage of the prevailing unfortunate epidemic to obtain an ex parte order by swearing on oath that he is not the Respondent's employee so as to found his right to leave/continue to leave in the Respondent's property. There is no order that preserves his employment and employment rights pending the determination of this case, not had he sought one.*

f) *It is a fundamental principle of law and the administration of justice that a right cannot be founded on an illegality, which in the case of obtaining the ex-parte order, was concealment of material facts, at the least, and perjury at the worst. The Claimant's conduct strikes at the heart and authority and dignity of the Court, which is most egregious in the circumstances.*

g) *Had the Honourable Court been aware of the truth, it may have informed its decision otherwise when the Claimant approached it ex parte.*

h) *The house in which the Claimant previously lived has been allocated to a legitimate and crucial member of the Respondent's staff who is in charge of foreign students that were not able to travel back to their countries owing to the prevailing pandemic. Consequently, if the Orders herein are not granted, not only the Respondent but third parties will suffer grave prejudice.*

i) *It is therefore in the interest of justice that this Application be heard at the earliest convenience of this Honourable Court.*

13. The Application is further supported by the Affidavit of **PROF. FATUMA CHEGE** the Respondent's Deputy Vice Chancellor (Administration) sworn on 9th April, 2020 in which she reiterates the averments made in the Notice of Motion Application.

14. In response to the application, the Claimant filed a Replying Affidavit sworn on 21/4/2020. He depones that the Respondent's application is an abuse of the Court's process as the Respondent is merely inviting the Court to try afresh matters that have already been canvassed and resulted in Orders that are the subject matter in the Contempt of Court proceedings.

15. He avers that the Respondent is making the application having not purged their contempt. He further avers that the Respondent's officers are feigning ignorance of the contents of his statement of claim which addressed the status and circumstances of his employment.

16. He avers that the Respondent's actions continue to expose his family and him to the risks of Covid-19 despite the Court's orders and directions by the Hon. Chief Justice on stay of execution. He contends that the Respondent's officers seem to be hell bent on continuing to disobey orders of this Court.

Claimant's submissions

17. The Claimant submitted that the applicable law and the test of contempt of Court is well settled in the case of **Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR**. He submitted that the standard in contempt proceedings was also affirmed in the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** where the Court held that *it is important however, that the Court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it.*

18. He submitted that the Respondent had no obligation to agree with the Order but they still had a duty to obey it. He submitted that the Respondent is seeking to sanitise its contempt through its application dated 9/4/2020 and continues to disobey this Court's Order instead of purging the contempt and seeking judicial recourse to set it aside. He relied on the case of **Re Estate of Kiptoo Cheboi (Deceased) [2019] eKLR**.

19. He submitted that this Court has pronounced itself on the obligation to obey court orders and wilful disobedience of Court orders in **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005] KLR 828**.

20. He argued that the Court should take judicial notice that Prof. Paul Kuria Wainaina who was cited for contempt has not filed a response despite being served with the application via email. He further submitted that the Prof. Fatuma Chege is incompetent to swear the Replying Affidavit as she is in violation of the Court's Order.

21. He relied on the case of **Miguna Miguna v Fred Matiangi, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 Others [2018] eKLR** where the Court found the Respondents in contempt and condemned them to pay costs.

22. He further submitted that the Court in **Republic v Principal Secretary, Ministry of Defence Ex Parte George Kariuki Waithaka [2019] eKLR** found the Respondent to have been aware of the orders and in contempt thereof.

23. He submitted that thus Court should consider this as an exceptional case where purging contempt may not offer appropriate remedy. He submitted that should the Court find that the prevailing circumstances make it no longer tenable for him to occupy the house, the Respondent should be condemned to meet the costs of delivering undamaged household items to his destination of choice.

Respondent's Submissions

24. The Respondent on the other hand submitted that the ex parte orders granted by this Honourable Court were issued without full disclosure of material facts by the Claimant and therefore ought to be set aside. To fortify this argument the Respondent cited and relied on the cases of **Republic Vs Business Premises Rent Tribunal Interested Party John Mwangi Muturi & 3 Others (2016) eKLR** where the

Court held that *where a Plaintiff is seeking an equitable remedy he must show a good account of himself for the Court would be reluctant to extend its hand to a person with dirty and unclean hands for he will soil the hands of justice. The Court went on to state that the Courts would be strict on non-disclosure of material facts by a party seeking ex-parte orders more so when he has obtained the orders by concealing important material facts from the Court in the first instance.*

25. The Respondent further submitted that the Claimant's acts of concealing facts from this Honourable Court was tantamount to an abuse of the Court process and that this Court can therefore exercise its inherent power to terminate this proceedings without going to the merits of the case. To buttress this argument the Respondent cited the case of **Stephen Somek Takwenyi & Another Vs David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009.**

26. The Respondent urged this Court to prevent further abuse of the Court process and preserve its dignity and authority occasioned to it by the Claimant's failure to disclose all facts at the time of grant of the ex-parte orders.

27. The Respondent contended that the Claimant perjured himself in order to obtain the ex-parte orders and therefore urged this Honourable Court to set them aside.

28. The Respondent further contended that there is no interim order for the Claimant's reinstatement and therefore he has no right to be housed by it and that his continued stay is prejudicial to it as the said house has been allocated to another member of its staff. It is further the Respondent's contention that the Claimant is in arrears of rent for 6 months despite being directed by the Honourable Court to limited stay at the Respondent's premises subject to the payment of rent.

29. It is on this basis that the Respondent urged this Honourable Court to set aside the ex parte orders granted to the Claimant herein.

30. On the issue of contempt, the Respondent urged this Honourable Court to exercise its jurisdiction with caution given the effects of the Covid-19 pandemic as it had to down size its operations. The Respondent urged this Court to be guided by the Court of Appeal decision in the case of **Mutitika Vs Baharini Farm Limited (1985) eKLR** where it was held *that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt...*

31. The Respondent further cited the Supreme Court decision in the Case of **Republic Vs Ahmad Abolfathi Mohammed & Another (2018) eKLR** where the Court was *of the view that cases of contempt must be handled with utmost care and exercised only as a last resort as it involves deprivation of the alleged contemnor's liberty.*

32. The Respondent maintained that it was not aware of the existence of the ex parte orders as the same were served by electronic email as it was forced to down size its operations on 16/3/2020 due to the Covid-19 pandemic.

33. The Respondent further maintained that the Claimant has not proved that the said email was duly received by the Respondent herein and therefore the Claimant has failed to comply with the provisions of new Rule 22 B to Order 5 of the Civil Procedure Rules which provides that service of an email shall be deemed to be effected when the sender receives a delivery receipt.

34. The Respondent further submitted that it is not guilty of contempt as alleged by the Claimant herein and therefore urged this Honourable Court to dismiss the Application dated 3/4/2020 with costs to the Respondent.

35. The Respondent further urged this Honourable Court to allow its Application dated 9/4/2020.

36. I have examined the averments of both Parties. The 1st application filed by the Applicants relates to contempt which the Applicants aver was committed by the Respondents on 1/4/2020 in contempt of this Court's orders issued on 31/3/2020 injuncting the Respondents from evicting the Applicant from the Respondent's premises in which he was staying.

37. The Applicants insist that they served this order upon the Respondent's Counsel and also the Respondent's Vice Chancellor who was served via email.

38. The Respondents and the alleged contemnor deny being served with the order of the Court issued on 31/3/2020. The Respondent's Deputy Vice Chancellor aver that due to the lockdown, their offices closed on 17/3/2020 due to the Covid-19 pandemic and therefore the ex-parte orders of 31st March 2020 did not come to its attention.

39. In determining whether the Respondents are guilty on contempt or not, this Court must be satisfied that the orders issued by the Court were served upon the Respondents and that the Respondents in blatant disregard to the said orders, did or omitted to do an act in contempt of the said order.

40. From the averment by the Respondent, it is possible that the Order of this Court was never served upon the Respondents. Service upon the Respondent's Counsel cannot be said to be service upon the Respondent's Vice Chancellor Prof. Paul Kuria but service upon the Respondents themselves.

41. There is no indication that the Respondent's Vice Chancellor who the Applicant wants cited for contempt was served with the order of the Court.

42. The explanation by the Deputy Vice Chancellor (Administration) suffices that there was no proper service and therefore the Respondent's Vice Chancellor is excused on the allegation of contempt.

43. The Respondent as an institution has not been cited for contempt in the current application and that therefore lays to rest the entire application for contempt.

44. As for the 2nd application filed by the Respondents, the Applicant having been evicted from the Respondent's premises the application is already overtaken by events and is therefore spent.

45. As for orders sought by the Applicant seeking release of his confiscated household property, the Claimant/Applicant has not listed the property in question. I however direct that the Respondents do release, if any, property of the Applicant that they may have confiscated during the eviction process as prayed.

46. There will be no order of costs.

Dated and delivered in Chambers via zoom this **11th day of June, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwangi for Respondents – Present

Komolo

for

Applicant

–

Present