



**REPUBLIC OF KENYA**

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

**PETITION NO. 82 OF 2020**

(Before Hon. Justice Hellen S. Wasilwa 17<sup>th</sup> September, 2020)

CATHERINE NYAKOBOKE.....PETITIONER/APPLICANT

VERSUS

DR. EVENGELINE NJOKA.....1<sup>ST</sup> RESPONDENT

KENYA NATIONAL COMMISSION

FOR UNESCO (KNATCOM) .....2<sup>ND</sup> RESPONDENT

INSPECTOR-GENERAL OF

THE NATIONAL POLICE .....3<sup>RD</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

**RULING**

1. The Application before Court is the Applicant's Notice of Motion filed on 16/6/2020 seeking the following orders:-

***a) Spent***

***b) THAT this Honourable Court be pleased to issue an order against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to show cause within seven (7) days from the date hereof why they should not be held in contempt of court order issued on 26/5/2020 by Hon. Lady Justice Hellen Wasilwa.***

***c) THAT this Honourable Court be pleased to cite the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for contempt of this Court's order issued on 26/5/2020 by Hon. Lady Justice Hellen Wasilwa.***

***d) THAT the Court be pleased to suspend/set aside the decision contained in the letter dated 12/6/2020 summarily dismissing the Petitioner/Applicant and the decision contained in the letter dated 26/5/2020 suspending the Petitioner/Applicant herein pending hearing and determination of this Application.***

***e) That this Honourable Court be pleased to cite the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for contempt of this Court's order issued on 26/5/2020 by Hon. Lady Justice Hellen Wasilwa.***

***f) Costs of the application be provided for.***

2. The application is premised on grounds that:-

***a) On 26/5/2020, the Court issued an injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents terminating the services of the Applicant herein pending the hearing of the Application inter-partes.***

***b) On even date, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents issued a suspension letter putting the Applicant on half basic pay and full housing allowance with effect from 26/5/2020 and until such a time the disciplinary proceedings against her are concluded.***

c) On 24/5/2020 the Applicant was rushed to M.P. Shah Hospital Nairobi for exhibiting Covid-19 virus symptoms and upon testing it was confirmed that she was positive .She was rushed to Kenyatta University Referral Hospital where she was isolated for 14 days. On 26/5/2020, the Applicant's Advocates on record wrote to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents informing them of the Applicant's Covid-19 results and her isolation.

d) When the matter came up for inter-partes hearing on 11/6/2020, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents proceeded to summon the Applicant to appear before the disciplinary committee for hearing of her case. This was done in light of the existing Court order stopping the Commission from terminating or carrying out any process that would lead to her termination.

e) On 12/6/2020, the Applicant's advocates on record wrote to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents indicating that the Applicant would not attend the said disciplinary hearing for reasons that the Applicant disputed the disciplinary process for being unfair and deliberately choreographed to have her terminated contrary to her fundamental rights and provisions of the Employment Act, 2007.

f) On 12/6/2020, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent proceeded to issue a summary dismissal letter against the Court Order.

g) Despite being served with the Order, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have failed and/or refused to do the same and instead terminated the Applicant's employment.

3. The Application is supported by the affidavit of Catherine Nyakoboke Nyang'au sworn on 15/6/2020 in which she reiterates the grounds set out in the application.

4. Only the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's filed their responses to the Application. In addition, the matter proceeded by way of written submissions.

#### **1<sup>st</sup> Respondent's case**

5. The 1<sup>st</sup> Respondent filed Grounds of Opposition dated 29/6/2020 raising the following grounds:-

a) *The application and the entire suit is an abuse of the Court process in light of the existing suits filed by the same party being NRB ELRC Pet. No. 38 of 2020 and JR. No. 9 of 2020.*

b) *The impugned order was issued by the Court on 27/5/2020 when the Applicant had already been suspended, on 26/5/2020.*

c) *The ex-parte order lapsed on 10/6/2020 by operation of the law being Rule 17 (4) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Order 40 Rule 4 (2) of the Civil Procedure Rules when the matter was not placed before the Court.*

d) *On 17/6/2020, the ex-parte order was dead and incapable of resurrection. Further, there was no application made before Court to revive or extend the interim order and an audio recording of the proceedings of 11/6/2020 will bear this witness.*

e) *The order issued on 27/5/2020 did not stop the 2<sup>nd</sup> Respondent from carrying on disciplinary proceedings against the Applicant. The orders were issued upon material non-disclosure, gross and fraudulent misrepresentations and the Court ought to discharge them suo moto.*

f) *The 1<sup>st</sup> Respondent is not the Applicant's employer.*

#### **2<sup>nd</sup> Respondent's case**

6. In response to the application, the 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn by Dr. Evangeline W. Njoka, the 1<sup>st</sup> Respondent herein, on 1/7/2020. She depones that the Respondent became aware of the impugned order on 27/5/2020 and that the resolution to suspend the Applicant was made on 26/5/2020.

7. She depones that the Applicant is precluded from claiming that the said resolution was made in disobedience of the Court order as she has failed to tender any evidence to show that the order was duly served upon the 2<sup>nd</sup> Respondent before it made the resolution.

8. She avers that pursuant to Rule 17 (4) of the Employment and Labour Relations Court (Procedure) Rules, 2016, the impugned order could only subsist for an initial period of 14 days. She avers that when the parties attended Court on 11/6/2020, Counsel for the Applicant neither sought reinstatement of the impugned order nor its extension.

9. It is her averment that there was no Court order barring, restraining or otherwise stopping the 2<sup>nd</sup> Respondent from proceeding with the disciplinary proceedings or terminating her services as at 11/6/2020.

#### **Applicant's rejoinder**

10. In reply to the 2<sup>nd</sup> Applicant's Replying Affidavit, the Applicant filed a Further Affidavit sworn on 10/7/2020.

11. She admits that the *ex-parte* order was served upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 27/5/2020 and that as at that time, they had already issued her with a letter of suspension. However, the Court having issued an injunctive order on 27/5/2020, the summary dismissal letter dated 12/6/2020 blatantly disregarded the order.

12. She avers that when the parties appeared for *inter-partes* hearing on 10/5/2020 and 11/5/2020, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' advocates did not make any application to the court to either vacate, vary, set aside or discharge its orders.

13. She avers that the orders was issued *ex-parte* and were not subject to extension when the matter came up for *inter-partes* since the court was categorical that they were to subsist until further orders of this Court.

#### **Applicant's submissions**

14. The Applicant submitted that the objects of Order 40 Rule 4 and 6 of Civil Procedure Rules are clear and laudable as they intend to deal with mischief where a party that has obtained temporary injunction employs tactics to delay the disposal of the application for injunction or the suit.

15. She further submitted that the relief of temporary injunction is given statutory salutation in Section 63 of the Civil Procedure Act and Order 4 of the Civil Procedure Rules as a relief available to prevent the ends of justice being defeated.

16. She relied on the case of **Nairobi Hospice v Kenya Commercial Bank Limited & 2 Others [2017] eKLR** where the Court held that the lapse of an injunction contemplated under Order 40 Rule 6 should be so declared upon an application of a party. She further relied on the case of **Maxam Limited & 2 Others v Heineken East Africa Import Co. Ltd & 2 Others [2017] eKLR** where the Court held that where a Court does not state how long the order is to last, the affected party may at the expiry of 12 months move the Court to have the order vacated.

17. She submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were to formally or informally move the Court to have the order varied or set aside if they felt that they were violated by the said order. She submitted that the lapsing of the order would render the Petition useless, as the reason for filing the same was to ensure that status quo of her employment services was maintained.

18. She argued that the power to punish for contempt enables the Court to regulate its internal conduct and safeguard against contemnors or disruptive intrusions. She relied on the case of **Teachers Service Commission v Kenya National Union of Teachers & 2 Others [2013] eKLR** where the Court held that the reason to punish for contempt of Court is to safeguard the rule of law.

19. She cited the case of that **Winnie Muthoni Mburu & 25 Others v Nairobi City Council & 7 Others [2016] eKLR** where the Court held that personal service is not a strict requirement and that knowledge of the existence of orders suffices. She averred that the order was duly served upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through their offices physically and via their respective emails and they acknowledged receipt of the order by stamping upon the order.

20. The Applicant further submitted that the 2<sup>nd</sup> Respondent replied to the emails sent by her advocates on record. It was therefore her submission that Respondents failed to obey the Court orders by issuing the Applicant with a summary dismissal letter. She relied on the decision in **Econet Wireless Kenya Limited v Minister for Information & Communication of Kenya & Another** that the Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal with Contemnors.

21. The Applicant submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents knowingly and wilfully disobeyed the Court order of 27/5/2020 and prayed that the Court does allow her application.

#### **1<sup>st</sup> Respondents submissions**

22. The 1<sup>st</sup> Respondent maintained that the impugned order was issued on 26/5/2020 and extracted on 27/5/2020 when the 1<sup>st</sup> Respondent was served with the Order. It was her submission as at 26/5/2020, there was no order.

23. She submitted that the *ex-parte* order lapsed on 10/6/2020 by operation of law being Rule 17(4) of the Employment and Labour Relations Court (Procedure) Rules and Order 40 Rule 4 (2) of the Civil Procedure Rules when the matter was not placed before the Court. She submitted that without a formal application before Court, there were no order capable of being extended. She relied on the case of **NSSF v John Ochieng Opiyo [2006] eKLR** where the Court held that it cannot validate orders which upon expiry have ceased to exist.

24. She submitted that the Applicant has thoroughly failed to proof that there were existence *ex-parte* order capable of being disobeyed. She submitted that the elements set out in the case of **Wambui Kiragu (suing as administrator of the Estate of the Late Samuel Kiragu Michuki) v Governor Nairobi City County [2018] eKLR** must be proved to meet the threshold for civil contempt.

25. She cited the case of **Daniel Odhiambo Okaka v Samuel Udali Mtange & another [2018] eKLR** that there is no evidence of the wilfulness of the Respondents to disobey the Court Order as it was served after the exercise. She submitted that the Applicant has failed to discharge the burden of proof to warrant the Court to find her in contempt of Court order.

26. She submitted that the Applicant has failed to disclose that she had filed 2 suits being Petition 38 of 2020 and JR No. 9 of 2020 where the Court declined to issue her any order. She submitted that the withdrawal of the 2 suits could only have come after the Court was misled to

issue the order on 27/5/2020.

27. She submitted that it would have been proper for the Court to hear the Preliminary Objection, filed by the Respondents, before the contempt application. It was her submission that jumping to hear the contempt application appeared to give credence to the orders obtained illegally and unprocedurally. In support of this, she relied on the decision in **Geoffrey Chege Kirundi & 2 Others v Stephen Maina Githiga & 3 Others [2019] eKLR**.

28. She urged the Court to discharge any orders it had issued *suo moto* and also find that she is not in contempt of Court.

### **2<sup>nd</sup> Respondent's submissions**

29. The 2<sup>nd</sup> Respondent submitted that Rule 17 (4) of the ELRC (Procedure) Rules 2016 which mirror Order 40 Rule 4 (2) of the Civil Procedure Rules is couched on peremptory terms. The provision requires that an *ex-parte* injunction be granted only once for not more than 14 days and orders be extended once by consent of the parties or by the Court for an additional 14 days.

30. It is its submission that the impugned order having been issued *ex-parte* was to subsist for an initial period of 14 days and it could thereafter only be extended by consent of the parties or by the Court. Therefore, the order issued on 26/5/2020 lapsed on 10/6/2020.

31. It relied on the case of **Mrs. Rahab Wanjiru Evans v Esso (K) Ltd (1995-1998) EA 332** where the Court held that an *ex-parte* injunction order is granted for more than 14 days has no legal effect and cannot be extended. It submitted that counsel did not seek an extension of the Order on 10/6/2020 and did not seek reinstatement of the orders on 11/6/2020 when the parties appeared for *inter-partes* hearing.

32. It relied on the Court of Appeal decision in **Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation & 2 Others [1998] eKLR** that an *ex-parte* order made by the learned judge was made without jurisdiction since the maximum period for validity of the interim order was exceeded.

33. With respect to contempt of Court, it relied on the case of **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR** on the elements that make a case for contempt. It further relied on the case of **Mutitika v Baharini Farm Limited [1985] KLR 229** where the Court held that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities.

34. It submitted that it did not have knowledge or proper notice of the impugned *ex-parte* order issued on 26/5/2020 prior to its decision to suspend the Applicant. It argued that the order was served upon it on 27/5/2020 after the resolution to suspend the Applicant had been made.

35. It argued that there was no order barring the 2<sup>nd</sup> Respondent from terminating the Applicant's services if the disciplinary committee recommended it. In conclusion, it argued that an order that has lapsed or an order that is null and void *ab initio* cannot be the basis upon which any contempt proceedings is to be legitimately founded. It relied on the case of **Nicholas Salat v Independent Electoral and Boundaries Commission & Others [2013] eKLR** where the Court held that Courts cannot aid in circumventing rules and shifting goal posts seemingly to aid one side if it harms the innocent party that strives to abide by the rules.

36. It argued that its actions as from 11/6/2020 were not barred by any order. It urged the Court to strike out the Applicant's application with costs to the 2<sup>nd</sup> Respondent.

37. I have examined the averments of the Parties herein plus submissions filed. The issues for this Court's consideration are as follows:-

- 1. Whether the Respondents alleged Contemnors were served with the Court orders dated 26/5/2020 or had knowledge of the same.***
- 2. Whether the Respondents alleged Contemnors committed any acts or omission of contempt against the Court orders of 26/5/2020.***
- 3. What remedies care appropriate?***

### **Service or knowledge of Court Order**

38. On 26/5/2020, this Court issued an order injunctiong the Respondents from terminating the Petitioner's services pending the hearing of this application *interpartes* or until further orders of the Court. On the same day the Petitioner was issued with a letter suspending her from duty.

39. The Petitioner/Applicant contends that the order was served upon 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

40. The evidence of service of this order has been deduced from the fact that the Respondents filed a response to the application and Petition and filed a notice of appearance of advocates on 2/6/2020. They also filed their own application 2/6/2020 seeking to have the *ex-parte* orders of 26/5/2020 set aside.

41. The file was placed before J. Onyango on 2/6/2020 and she directed that the said application together with that of 5/3/2020 be heard on 10/6/2020.

42. On 11/6/2020 the Parties appeared before this Court and directions were given on dispensing of the application and a Preliminary Objection filed by the Respondents. The applications were to be heard together.

43. In the meantime, the Petitioner informed Court that they had withdrawn Petition No. 38/2020 and JR 9/2020 filed also in relation to similar matter.

44. On 11/6/2020 when Parties appeared in Court, the interim orders were extended and even if they were not as contended by the Respondent, there was no orders issued varying the exparte orders of 26/5/2020 which were to remain in force until further orders of the Court.

45. The import of the above analogy is that the exparte orders remain in force to date and the Respondents were well aware of their existence.

46. In **Basil Criticos vs Attorney General and 8 Others (2012) eKRL**, Lenaola J (as he then was) stated 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.”***

47. It is my finding that the action of the alleged Contemnors points to the fact that they had knowledge of the Court order in question.

#### **Action**

48. Given that the alleged Contemnors had knowledge of the Court order, did they act in a manner in contempt of the order?.

49. The Applicant avers that despite the existence of the Court order, the alleged Contemnors proceeded to subject the Applicant to a disciplinary process and proceeded to dismiss her from her employment.

50. This act was not denied by the Respondents. The fact that the Respondents dismissed her is not denied. In the circumstances it is my finding that the Respondents acted in contempt of the Court order and are therefore guilty of contempt of Court.

#### **Remedies**

51. Having found the Respondents guilty of contempt of Court, it follows that they are subject to punishment by the Court.

52. Other than punishment, the action committed against the Court order must be rectified. In the circumstances, the prayer to suspend the impugned decision contained in the letter of 12/6/2020 is suspended and the Applicant is accordingly reinstated to her employment pending any further orders from this Court.

53. The Respondent will bear costs of this Petition.

**Dated and delivered in open Court this 17<sup>th</sup> day of September, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

#### **JUDGE**

#### **In the presence of:**

Milkwa holding brief Gitonga for 2<sup>nd</sup> Respondent – Present

Manwa for Petitioner/Applicant – Present

Kirimi for 1<sup>st</sup> Respondent – Present

Kinyua for 3<sup>rd</sup> and 4<sup>th</sup> Respondent – Present