



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 165 OF 2020

(Before Hon. Lady Justice Hellen S. Wasilwa on 16th September, 2020)

TERRY WIJENJE.....CLAIMANT/1ST RESPONDENT

GODFREY KIPTUM.....2ND RESPONDENT

INSURANCE REGULATORY AUTHORITY.....3RD RESPONDENT

MERCY WAIRIMU KIANA.....4TH RESPONDENT

JOHN KATIKU.....5TH RESPONDENT

RODGERS KINOTI M'ARIBA.....6TH RESPONDENT

VERSUS

DIRECTLINE ASSURANCE COMPANY LIMITED.....1ST RESPONDENT/APPLICANT

ROYAL MEDIA SERVICES LIMITED.....2ND RESPONDENT/APPLICANT

ROYAL CREDIT LIMITED.....3RD RESPONDENT/APPLICANT

SAMUEL KAMAU MACHARIA.....4TH RESPONDENT/APPLICANT

PURITY GATHONI MACHARIA.....5TH RESPONDENT

ISAAC NGARU.....6TH RESPONDENT

DAVID NGUGI.....7TH RESPONDENT

RULING

1. On 25/6/2020, the Applicants filed the Application dated 24/6/2020 seeking leave of Court to file contempt of Court proceedings against the Respondents in the originating notice which was annexed to the Application. Consequently, the 1st Respondent filed the Preliminary Objection dated 3/7/2020 raising the following preliminary points of objection:-

a. THAT this Honourable Court being an Employment and Labour Relations Court lacks the jurisdiction to determine complaints/disputes touching on the corporate governance of a company.

b. THAT this Honourable Court lacks the jurisdiction to determine non-employment law matters that touch on issues that do not arise from an employer-employee relationship.

c. THAT this Honourable Court lacks the jurisdiction to entertain an application that does not relate to breach of fundamental rights ancillary and incidental to those matters falling within the provisions of Section 12 (1) of the Employment and Labour

Relations Court Act and Article 41 of the Constitution of Kenya.

d. THAT the application is bad in law and should be struck out in limine with costs to the 1st Respondent.

2. Parties agreed to dispense with Preliminary Objection by way of written submissions with both parties filing their submissions. The Applicants opposed the Preliminary Objection through their submissions.

The 1st Respondent's Written Submissions

3. The 1st Respondent submits that the email sent by the 6th Respondent to the 1st, 4th and 5th Respondents and which forms the basis of the application for leave, relates to the internal management and conduct of affairs of the company. As such, this Court being an Employment and Labour Court lacks the jurisdiction to determine disputes relating to the corporate governance of a company.

4. It is therefore submitted that to entertain this Application would be tantamount to interference in the running of a company, which is in excess of this Court's jurisdiction and outside the ambit of its constitutional mandate. The 1st Respondent notes that there exists **E278 of 2019; Directline Assurance & 4 Others vs. Sureinvest Company Limited & 15 Others** which relates to the 1st Applicant's shareholding and the conduct of affairs within the Board of Directors. As such, the Applicants should present the application in the correct forum.

5. Further, the application is fatally defective as it seeks to cite parties who are not in an employer-employer relationship with the Claimant in the original action as filed against the 1st to 7th Applicants. It is the 1st Respondent's submissions that the email complained of originated from another director and not the 1st Respondent, hence the 1st Respondent cannot be held liable for contempt.

6. The 1st Respondent relies on the cases of **Peter Kahara Munga vs. Waria Mwangi, Governor Murang'a County & 2 Others [2018] KLR**, **George Onyango Ochieng vs. Chemelil Sugar Company Limited [2014] eKLR** and **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited and 2 Others [2012] eKLR** to support the preliminary objection.

The Applicants' Submissions

7. The Applicants submit that the first contempt is a collusive bargain by the Respondents to handover the management of the 1st Applicant's business to the 1st Respondent, upon her failure to get a mandatory order for reinstatement. The second contempt is the intended destruction of the 1st Applicant's business. It is their position that the instances outlined hereinabove consist of interference of administrative of justice hence worthy of permission to institute contempt of Court proceedings. To buttress this position, they rely on the cases of **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR**, **Sembcorp Marine Limited vs. Auro Anthony Sebastian [2012] SGHC 52**, **Her Majesty's Attorney General vs. Punch Limited & Another [2002] UKLR 50**, **McGuinness vs. Attorney-General (Vict.) [1940] ALR 110** and **Her Majesty's Solicitor General vs. John Holmes [2019] EWHC 3765 (QB)**.

8. It is their further submissions that this Court has the jurisdiction to hear an application for contempt. They have cited **Arlidge Eady as Smith on Contempt 3rd Edition at page 777** which states that a party who destroys the subject matter of a suit like the Respondents are intending to, is liable for contempt of Court.

9. The Applicants submit that in exercising its jurisdiction under Article 162 (2) (a) of the Constitution, this Court must consider incidental issues of company law, land law and law of equity where they bear upon the contract of employment. They rely on Section 5 of the Judicature Act which grants the High Court and Court of Appeal the jurisdiction to punish for contempt, and the case of **Republic vs. Karisa Chengo & 2 Others [2017] eKLR** where the Supreme Court held that the High Court, the Employment and Labour Relations Court and the Environment and Land Court are Courts of equal status, autonomous of each other and exercising peculiar jurisdiction. They also rely on the case of **K.G. Patel & Sons Limited vs. John Kabukuru Gituro [2016] eKLR** which held that this Court has inherent powers to protect its dignity and prevent abuse of Court process. The cases of **Board of Governors, Moi High School Kabarak & Another vs. Malcom Bell [2013] eKLR** and **Akber Abdullah Kassam Esmail vs. Equip Agencies Limited & 4 Others [2014] eKLR** were also relied on.

10. The Applicants submit that they have established a *prima facie* case that there has been a failure of public duty hence entitled to leave to file contempt of Court proceedings. The Applicants have placed reliance upon the case **Mirugi Kariuki vs. Attorney General [1992] eKLR** and **Franklin Imbenzi Kalumbo vs. Independent Electoral and Boundaries Commission & Another [2017] eKLR** to support this position.

11. The Applicants submit that in the case of **Peter Kahara Munga vs. Wairia Mwangi, Governor Murang'a County & 2 Other [2018] eKLR** relied upon by the 1st Respondent, the Court observed that the reliefs sought in the Petition could be granted in a matter that rightly came to the Court as an employment issue. However, the application was not one of contempt of Court and the Petitioner therein had not sought reliefs as an employee of the 1st Interested Party thereof, it was thus better for him to seek reliefs before the commercial Court as it dealt with matters under the Companies Act.

12. It is submitted that in the case **George Onyango Ochieng vs. Chemelil Sugar Company Limited [2014] eKLR** relied on by the 1st Respondent, the Claimant sought compensation for the use of his image in an advertisement for the Respondent's products. However, that is a claim that can only be raised in the Civil or Commercial Court not in the Employment Court, and did not involve contempt of Court by interference with due administration of justice.

13. I have examined this application without going into the merits or otherwise of this application for leave to institute contempt proceedings. Courts have pronounced themselves on this matter.

14. See Civil case No. 111/2016 where J. Njuguna stated as follows:-

“The statutory basis of contempt of Court in so far as the High Court is concerned is Section 5 of the Judicature Act. Section 63 (3) of the Civil Procedure Act provides that a disobedience of an order of a temporary injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnor’s property.

Section 5 (l) of the Judicature Act provides as follows:-

“The High court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

15. As to whether leave is necessary before filing of contempt of Court proceedings, the rules of Supreme Court made under the Supreme Court of Judicature Act 1973 provide the procedure of commencing the contempt of Court proceedings. Under the said procedure, an application to the High Court of England for committal for contempt of Court will not be granted unless leave to make such an application has been granted.

16. But, following the implementation of the famous Lord Wolf’s;

“Access to justice Report 1996”, the Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. In the year 2012, the Civil Procedure Rules 2012 come into force and Part 81 thereof effectively replaced Order 52 RJC in its entirety. Part 8 (Applications and proceedings in relation to contempt of Court”

Provided different procedure for four different forms of violations

Rule 81:4 relates to committal for breach of a judgment order or undertaking to do or abstain from doing an act.

Rule 81:11 committal for interference with the due administration of justice.

Rule 81:16 committal for contempt “in the face of the Court” and Rule 81:17 committal for making false statement of truth or disclosure statement.

17. In the case of Christine **Wangari Gachege Civil Case No. 456 of 2011**, *“the Court of Appeal correctly pointed out that leave now called “permission” is not required where committal proceedings relate to a breach of a judgement, order, or undertaking. However, leave is still a requirement for applications under Rules 81.12 & 81.17 cited above. I concur with that finding by the Court of Appeal.....”*

18. In the instant application, the contempt does not relate to breaching of an order, judgement or undertaking, leave to file contempt proceedings is therefore required.

19. The Respondents aver that this Court has no jurisdiction to grant the leave sought because the issue is dispute touching on the corporate governance of the company and that there is no employer-employee relationship between the Applicants and those seeking to be cited for contempt.

20. In the Main Claim, the issue relates to the Claim between the Claimant and her employer. Any action that would render the Claim nugatory including changes in the employer that would render the Claim untenable or the substratum of the Claim changed is of interest to the Claimant.

21. The Claimant must however show how the changes directly affect her.

22. The application for leave to institute contempt proceedings must also demonstrate that the Respondents alleged Contemnor have done or omitted to do something knowingly interfering with the substratum of the Claim.

23. The application raised as a Preliminary Objection however cannot be finalized without such demonstration, which in effects goes beyond the law and includes facts and which the circumstances go beyond the purview of the Preliminary Objection as enunciated in **Mukisa Biscuit** case.

24. I find the Preliminary Objection then has no merit as raised and I dismiss it accordingly and order that the Applicants proceed with their application dated 25/6/2020.

25. Costs in the cause.

Dated and delivered in Chambers via zoom this 16th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nduta holding brief Kamau for Respondent/Applicant – Present

Mugenyu holding brief Odhiambo for 1st Respondent – Present

Mbilo for 2nd to 6th Respondents