



**REPUBLIC OF KENYA**

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

**NAIROBI**

**JUDICIAL REVIEW NO. 4 OF 2020**

**DENNIS KIPKIRUI MARITIM .....PETITIONER**

**AND**

**THE PRINCIPALS SECRETARY**

**STATE DEPARTMENT FOR**

**CORRECTION SERVICES .....1ST RESPONDENT**

**THE HON. ATTORNEY GENERAL .....2ND RESPONDENT**

**THE COMMISSIONER GENERAL OF PRISON..... 3RD RESPONDENT**

**THE COMMANDANT KENYA PRISONS STAFF**

**TRAINING COLLEGE .....4TH RESPONDENT**

**THE HON. ATTORNEY GENERAL .....5TH RESPONDENT**

**RULING**

1. On 9.3.2020, I delivered a ruling by which I directed that the leave granted by the court to apply for judicial review on 20.2.2020 do operate as stay of the impugned decision by the 1st, 3rd and 4th Respondents to dismiss the applicant from the training at the Kenya Prisons Training College pending the hearing and determination of this suit. For avoidance of doubt, the court directed the 1st, 3rd and 4th Respondents to readmit the applicant to the said college and continue to offer training pending the hearing and determination of the suit. The court further directed that the suit be heard on priority basis.

2. The Respondents did not comply with the said stay orders and directions and the applicant brought the instant application dated 24.6.2020 seeking the following orders:

(a) That the Principal Secretary State Department for Correctional Services be committed to civil jail for contempt of court and/or for disobedience of the order issued by this court on 10.3.2020.

(b) That a declaration be issued that Mrs. Zainab Hussien (EBS) is unfit to hold public office on account of her violation of the Constitutional Rights of the Applicant as laid down in the Constitution and written law.

(c) Costs of the application be provided for.

3. The application is premised on the grounds set out in the body of the Motion and the Supporting Affidavit sworn by the applicant on 24.6.2020. The Respondent opposed the application vide the Replying Affidavit sworn by Mr. Kennedy A. Ahinda on 15.7.2020. The application was canvassed by written submissions.

**CLAIMANT’S CASE**

4. The Applicant’s case is that the Respondent was served with court order dated 10.3.2020 on 11.3.2020. He filed Affidavit of Service and copy of the served order duly signed. According to the Applicant, the Respondent deliberately disobeyed the court order by failing to

readmit him back to the training college as directed by the court. That the said disobedience amounts to disrespect to this court and the law, and it has occasioned damages and he continues to suffer detriment. He, therefore, prays that the Respondent be committed to civil jail and declared unfit to hold public office for failure to comply with the said court order. He concluded by observing that this court's jurisdiction to uphold its dignity by punishing contemnor like the Respondents.

5. On the other hand, the applicant submitted that there is clear evidence of personal service of the order and a Penal Notice on the Respondent. That the said service was admitted by Mr. Wycliffe Ogallo in the letter dated 12.3.2020 to the Applicant's counsel and copied to the Deputy Registrar of the court. He relied on definition of contempt of court given in **Stewart Robertson v. Her Majesty Advocate 2007 HCAC63** and urged the court to find that the Respondents have wilfully disobeyed the said court order.

## **RESPONDENT'S CASE**

6. The Respondents' case is that they have not wilfully refused to comply with the said court order. It is their case that all the parties to whom the order was directed have taken the necessary steps to ensure adherence to the said order in so far as the readmission of the application for training is concerned.

7. It is the Respondents contention that after the first corona virus case in Kenya was reported on 13.3.2020, the Training College was put under lock down on the same day. That due to the Ministry of Health Directive on proper protocol the application would not be readmitted back to the training.

8. In addition, the Respondents contented that since the applicant's suspension from training, he missed a lot of training and could not be readmitted in the circumstances. They have contended that the Claimant's colleagues have since graduated in a pass-out ceremony held on 13.8.2020 and as such the readmission is not possible in that group. The Respondents have however undertaken to readmit the applicant during the next recruitment. They therefore argued that there is no contempt of court since they made reasonable attempts to comply with the court order and there is no intention to disobey the order.

9. As regards violation of the applicants' Constitutional right and the Respondent being unfit to hold public office, the Respondent contended that the alleged violation has not been pleaded specifically. They contended that they are willing to readmit the applicant to training during the net recruitment. Consequently, they have denied that they have violated the applicant's Constitutional Rights.

10. In view of the above matters the Respondent submitted that the orders sought herein should be declined. They relied on **Republic v University of Nairobi & 2 Others [2019] eKLR** where the court held that standard of proof for contempt of Court is higher than that in normal civil cases. They also relied on **Miguna Miguna v. Fred Matiang'i Cabinet Secretary Ministry of Interior and Coordination of National Government & 8 Other [218] eKLR** where the court held that the power to punish for contempt must be exercised sparingly and only where the court is satisfied that a misconduct has been committed. Therefore, they prayed for the instant application to be dismissed with costs because the applicant has not proved contempt of court or violation of any of his Constitutional Rights.

## **ISSUES FOR DETERMINATION**

11. The issues for determination are: -

- (a) Whether the Principal Secretary, State Department for Correctional Services is in contempt of court order dated 10.3.2020.
- (b) Whether the said officer should be committed to civil jail for contempt of court.
- (c) Whether Mrs. Zainab Hussien should be declared unfit to hold public office on account of her violation of Applicants Constitutional Rights.

### **(a) Whether the respondent is in contempt of this court's order dated 10.3.2020.**

12. The power to punish for contempt of court must be exercised carefully because of its potential to cost a person his/her liberty and as such the following threshold must be met before punishing for contempt: -

- a) Proof of personal service or knowledge of the decision, decree or order of the court on the contemnor;
- b) Proof of violation of the decision, decree or order of the court by the contemnor; and,
- c) Proof that the violation of the decision, decree or order was deliberate.

### **Proof of personal service or knowledge**

13. In Kenya, contempt proceedings are governed by the law applicable in England as at the time the proceedings are instituted. **Rule 81. 5 of the English Civil Procedure (Amendment No.2) Rules 2012** provides that a Judgment/Order of the Court must be served upon the person required to do the act in question. However, the Court can dispense with such personal service under Rule 81.8 of the Rules which 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.”* [emphasis added]

14. In this case the respondent has not denied service and knowledge of the ruling and the order of stay granted by this Court. The Ruling herein was delivered on 9.3.2020 in the presence of Counsel for the applicant Mr. Savwa and Ms Oyugi for the Respondents. The said presence of the counsel in court when the ruling was delivered is sufficient to hold that the Respondents were aware of the Judgment. In **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**, the Court of Appeal 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]

15. Again in **Basil Criticos v Attorney General & 4 others [2012] e-KLR** Lenaola J (as he then was) held that:

*“... the law has changed and so as it stands today, knowledge supersedes personal service and for good reason... where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that service must be proved is rendered unnecessary.”*

16. 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.”*

17. In this case I am satisfied that the respondent was aware of the ruling and the court order dated 9.3.2020.

#### **Proof of violation of the Court Order dated 9.3.2020**

18. In this case the court made the following orders in the ruling delivered on 9.3.2020:

*“In conclusion therefore I direct that the leave granted to the applicant on 20.2.2020 to apply for orders of Certiorari and Prohibition shall operate as stay of the decision of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to dismiss the applicant from the training at the Kenya Prisons Training College pending the hearing and determination of this suit. For avoidance of any doubt, I direct the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to readmit the applicant to the said college and continue to offer the required training pending the hearing and determination of the suit which shall be heard on priority basis. Costs in the cause.”*

19. The respondent has through the Replying Affidavit sworn by Mr. Kennedy Ahinda, admitted that the order was not complied with.

#### **Proof that the failure to comply was deliberate**

20. In **Republic v Ahmad Abolfathi Mohammed & another [2018] e KLR** the Supreme Court held that:

*“This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”* [Emphasis Added]

21. The respondent explained that the failure to comply with the orders was because the applicant had been out of the training for three months and had missed crucial training areas which had been covered by the rest of the recruits. The respondent produced as an exhibit, a letter from the Commissioner General of Prisons dated 12.3.2020 by which service of the order dated 9.3.2020 was acknowledged and the following proposal made: -

*“6. The only and best way for the subject to be assisted given the circumstances is to accord him the first priority come next recruitment exercise. This will facilitate his attendance of the whole training package without missing out on vital training areas ensuring his own security.”*

22. In paragraph 15 of the Replying Affidavit, the affiant deposed that the foregoing proposal was acceptable to the applicant, the same

could be adopted as a judgment by consent of both parties. I have considered the said explanation and the proposal by the respondent and although I find merits in it, I wonder why she never applied for review and/or variation of the same after it was found to be hard to execute.

23. In **Refrigerator & Kitchen utensils Ltd v Gulabchand Shah & others Civil Application No. Nai 39 of 1990** the Court of Appeal held that:

*“It was plain clear and unqualified obligation of every person against or in respect of whom an order was made by the court of competent jurisdiction to obey it until that order was discharged, and disobedience of such order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he purged his contempt. A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular... he should apply to the court that it might be discharged. As long as it exists, it must not be disobeyed.”*

24. In this case, the respondent did not challenge the order by appeal or review but merely ignored it forcing the applicant to file the instant application. Consequently, I am satisfied that the applicant has established that the respondent in the instant application, one ZAINAB HUSSEIN Mrs (EBS) who is also the Principal Secretary State Department for Correctional Services, is in contempt of this Court's Order dated 9.3.2020.

**(b) Whether the cited contemnor should be committed to civil jail.**

25. In **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR** the Court of Appeal held:

*“When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who decides to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”*

26. In this, I have considered the reason given by the contemnor for the failure to comply with order and the proposed consent judgment as mitigating factors before sentencing the respondent. I will therefore defer the sentencing of the contemnor to give the parties a chance to record the proposed consent judgment since the applicant's class completed the training and graduated in August 2020.

**(c) Whether Mrs Zainab Hussein should be declared unfit to hold public office for violating the applicant's Constitutional rights**

27. The court declines to make the declarations sought because the applicant has not set out the particulars of the alleged violated rights and the manner in which the violation has been done. In addition, the declaration sought is in nature of substantive relief with far reaching consequences on the respondent and as such it should be sought through substantive pleadings to enable the court to investigate the allegations before pronouncing itself.

28. In the end, I allow the application to the extent that the respondent, Mrs. Zainab Hussein, Principal Secretary State Department for Correctional Services, is cited for contempt of this Court Order dated 9.3.2020. Sentencing is, however deferred to give the parties a chance to consider the proposed consent judgment. The matter will be mentioned on a date to be agreed today between the counsel for the two sides.

**Dated and delivered at Nairobi this 17<sup>th</sup> December, 2020.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**