



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE 69 OF 2019

COUNCIL OF GOVERNORS.....APPLICANT

VERSUS

SETH PANYAKO.....1ST RESPONDENT

MAURICE OPETU2ND RESPONDENT

JOHN GWASI3RD RESPONDENT

ASHA ALI IDO.....4TH RESPONDENT

KENYA NATIONAL UNION OF NURSES.....5TH RESPONDENT

MINISTRY OF LABOUR AND SOCIAL PROTECTION1ST INTERESTED PARTY

MINISTRY OF HEALTH.....2ND INTERESTED PARTY

THE ATTORNEY GENERAL.....3RD INTERESTED PARTY

RULING

1. On 5th February, 2019, this court upon being moved by the applicants through a Notice of Motion dated 4th February, 2019 did order among others as follows:

“In the circumstances the court will acknowledge the respondent’s right to call a strike but order that the strike notice and any industrial action already commenced be suspended for a period of sixty days and that parties to the dispute through their officials and or representatives submit themselves to the conciliation process and that a report be filed in court at the end of sixty days period. Matter be set for mention on 16th April, 2019 before any Judge for further directions. Any party shall however have the liberty to apply for any direction in the meantime”

2. It is the above order which triggered the present application dated 11th February, 2019 in which the applicant seeks orders inter alia that the court finds and holds the 1st, 2nd, 3rd 4th and 5th respondents herein in contempt of court order issued on 5th February, 2019. Further, the applicants sought that the said respondents be summoned to court forthwith to show cause why they should not be committed to civil jail. The application was supported by the affidavit of one Jacqueline Mogeni in which she deposed among others that:

- a. On 6th February, 2019 the respondents and interested parties were duly served with the applications dated 4th February, 2019 and the court order issued on 5th February, 2019.
- b. Further to service of the pleadings and order the applicant forwarded a copy of the order to the respondent’s official email on 6th February, 2019.
- c. To date the respondents have failed to call off the strike in compliance with the order.

3. In response to the application Mr Seth Ojienda who curiously informed the court that he appeared for the 5th respondent only but on instructions of 1st to 4th respondent, filed a notice of preliminary objection in which he contended among others that the application dated 11th February, 2019 was incompetent and untenable in law as it was brought under the guise of contempt of court Act No 46 of 2010 which was declared unconstitutional in the case of Kenya **Human Rights Commission Vs A.G. [2018] eKLR** and further that the application was brought under Civil Procedure Act in pervasion of the Employment and Labour Relations Court Act. Counsel further contended that the applicant lacked the *locus standi* to sue and be sued on behalf of the County Services Boards. Counsel did not file a replying affidavit to counter the factual allegations against the 5th respondent one of whom he represented.

4. In his submission in support of the application, Mr Lawi for the applicant submitted that the preliminary objection had been filed by a party without clean hands. Counsel asserted that obedience to court orders was not discretionary and that the respondents should have complied with the order of the court then seek legal redress. According to counsel, compliance with a court order was a matter of concern to the claimant since it touched on delivery of health services and rule of law was at the risk of being undermined. Mr Lawi further submitted that the respondents have been duly served.

5. Ms Oyugi for the Interested Party associated herself with the submissions by Mr Lawi and stated that the respondents were in contempt of Court.

6. Mr Ojienda on his part submitted that service should have been personal. According to Counsel, the only application served was one of contempt which was slipped under the door to the respondent's offices. According to Counsel the 5th respondent could not be guilty of disobeying an order they were never served with. Further that the 1st - 4th respondent never stay in the 5th respondent's offices on a day to day basis. Counsel therefore submitted that it was not shown whether the 1st to 4th respondents were present on the material day to be served.

7. On the issue of email Counsel submitted that service was never effected as per the text of the email. Further that there was no confirmations that the 1st to 4th respondents share same address as the 5th respondent.

8. In response to Mr Ojienda's submission, Mr Lawi stated that the wording of Order 5 rule 14 of the Civil Procedure Act allows a party to affix a copy of an order on the last known premises. According to Counsel respondent closed its offices and locked out the process server prompting him to affix the order on the door of the 5th respondent.

9. An allegation of contempt of court is a serious one since if proved, would greatly undermine the authority of the court. The issue is therefore more of serious concern to the court than the party to the benefit of whom the order was made. It therefore does not matter the novelty or otherwise of submissions by Counsel. The issue is plain and simple. That is to say was there an order lawfully issued by the court? If so was the order reasonably brought to the attention of the person to whom it was directed? And finally has the person complied with the order? If not has the person sought at the next available opportunity to have the order reviewed or set aside or appealed to superior court against the order?

10. A party against whom a court order has issued does not have the discretion to elect whether to obey the order or not. Wilful disobedience to a court order is an affront to the rule of law and administration of justice which is a recipe for chaos and anarchy. The court when confronted with an allegation of wilful disobedience to its authority must seize the moment and stamp its authority by swiftly and appropriately punishing for such disobedience.

11. The Judiciary personified by Judges and other Judicial officers remain the most solid bulwark for the protection of rule of law and every subject including the President is subject to the jurisdiction of the court when enforcing the rule of law.

12. The court is aware that the 1st to 4th respondents herein have publicly declared that they will defy the President in this dispute but while that might be so and would play brave in arena of politics and social grandstanding, the Court will not allow itself to be treated to conduct or behavior that would undermine the rule of law.

13. The respondents herein have with a tongue in the cheek claimed that they have not been served with the order of the Court made on 4th February, 2019 suspending the strike pending conciliation however from the material laid before court through affidavits of service and attachments, the Court is reasonably persuaded that the respondents were duly served. In any event the filing of this application and the orders of the Court have been widely reported in both print and electronic media hence the respondents cannot rely on outdated technicality to claim lack of knowledge of the court order.

14. Lenaola J (as he then was) in the case of **Basil Criticos Vs Attorney General & 8 Others [2012] eKLR** stated:

“...the law has changed as it stands today. Knowledge supersedes personal service

...where a party clearly shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary”.

15. The court is convinced that the respondents are aware of the existence of the court order hence the proper order that commends itself to me in the circumstances is to order Mr Seth Panyako, Maurice Opetu, John Gwasi and Asha Ali Ido as officials of the 5th respondent to personally appear before this court on 26th February, 2019 to show cause why they should not be punished for contempt of court.

16. The court further warns that any further dissemination and or publications by the respondents or their agents in print or electronic media

of the support or further calling of the strike which is suspended by the order of this court on 4th February, 2019 shall constitute continuing contempt of Court.

17. It is ordered.

Dated at Nairobi this 18th day of February, 2019

Abuodha J. N.

Judge

Delivered this 18th day of February, 2019

Abuodha J. N.

Judge

In the presence of:-

.....for the claimant

.....for the Respondent