



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 28 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 12th February, 2019)

ROBERT NYABUTO OBWOCHA.....PETITIONER

VERSUS

RONALD KIPROTICH TONU.....1ST RESPONDENT

KENYA UNION OF POST

PRIMARY EDUCATION TEACHERS.....2ND RESPONDENT

RULING

1. The Application before this Honourable Court for determination is the one dated 16th March 2018 and filed under the provisions of sections 4, 23, 24 and 25 of the Contempt of Court Act of 2016.

2. The Applicant seeks the following orders:-

a. Spent.

b. THAT in the first instance summons be issued against Akello M. T. Misori, the Secretary General of the 2nd Respondent herein to appear in court and show cause why he should not be punished for contempt of court and/or disobedience of a court order.

c. THAT upon such appearance and in the event of his failure to show cause, the Defendant herein be committed to civil jail or he pays a fine.

d. THAT the costs of this Application be borne by the Respondent.

3. The Application is supported by the Petitioner's Affidavit sworn on 16th May 2018 and is based on the grounds as set out herein below.

4. The Court issued an order directing the 2nd Respondent to conduct union elections for the position of Assistant National Treasurer within a period of 60 days. The period was extended on several occasions until 3rd October 2017 when it was extended for a period of 5 months. The time to conduct the election lapsed on 3rd March 2018 and no election has been conducted to date.

5. The Applicant avers that the 2nd Respondent's conduct amounts to contempt of court and ought to be punished.

6. On 14th June 2018, the 2nd Respondent filed the Replying Affidavit of Maurice Akelo Misori sworn on even date. The 2nd Respondent avers that the instant application is *mala fide*, misconceived, incompetent, vexatious, frivolous and an abuse of the court process and no contempt order should be granted at the Applicant's behest.

7. The 2nd Respondent contends that on 23rd September 2016, the 1st Respondent made an application seeking orders for stay of execution of the judgment and decree pending the hearing and determination of the appeal.

8. The Application was dismissed and the Respondent directed to conduct the said elections within 30 days from the date of the Ruling. However, the Respondent experienced difficulties in complying with the Court order like the inability to reach the delegates and executive

committee who had travelled and were scattered across the country.

9. The 2nd Respondent avers that a notice of elections was issued on 5th September 2017. The 2nd Respondent requested the OCS Capitol Hill Police Station to provide security during the elections. However, the 1st Respondent together with other Applicants obtained orders of Court debarring the Registrar from expunging the 1st Respondent's name from the 2nd Respondent's register or effecting any changes to the Register. It is the Respondent's assertion that the Petitioner was aware of the said order.

10. The deponent avers that he has not acted in contempt of court because he had no capacity to call for elections without the resolution of the National Governing Counsel (sic). He further avers that the application is non-suited as he was not a party to the petition and that no orders were issued directing or refraining him from performing any act.

11. On 22nd June 2018, the 1st Respondent filed his Replying Affidavit sworn on 21st June 2018 in response to the Petitioner's application. The 1st Respondent asserts that the order in issue is the order delivered on 2nd September 2016. He avers that he lodged Appeal No. 311 of 2011 before the Court of Appeal, which appeal is still pending.

12. It is the 1st Respondent's case that there were two orders of this Honourable Court concerning petitions number 107 of 2017 and 10 of 2018 both precluding the alteration of the 2nd Respondent until the petitions were heard and determined. The petitions are still pending in Court.

13. The 1st Respondent avers that the application herein is premature as the hands of the Secretary General and Registrar of Trade Unions are tied. He further avers that the Applicant is no longer a member of the 2nd Respondent.

14. On 2nd July 2018, the Applicant filed a Further Affidavit sworn on 28th June 2018, in response to the Respondents' replying affidavits. The Applicant avers that the orders issued in petitions number 107 of 2017 and 10 of 2018 did not stay any elections.

15. The Applicant also avers that the 1st Respondent is currently not holding any position of the union and the position of Assistant National Treasurer remains vacant. He further avers that the 2nd Respondent has never responded to the letter dated 20th April 2018 from the Ministry of Labour and Social Protection where the 2nd Respondent was advised to hold elections and it also noted that the issues raised in petition number 107 of 2017 were not related to the instant case.

16. The Applicants contends that he still a member of the 2nd Respondent.

Submissions by the parties

17. The Petitioner in his written submissions dated 10th July 2018 and filed on 23rd July 2018, submits that the decree issued on 5th September 2016 was clear, unambiguous and binding on the Respondent since the Respondents have not pleaded anything to the contrary. It is the Petitioner's submissions that the Respondents had knowledge of the terms of the decree since they made applications relating to the decree.

18. The Petitioner further submits that the 2nd Respondent has not demonstrated its compliance with the order in question or produced any order that sets aside the same.

19. It is the Petitioner's submissions that the 2nd Respondent is in contempt of court and ought to be punished because a court order must be obeyed whether one agrees with it or not. He relies on the case of **Econet Wireless Kenya Limited vs. Minister for Information & Communication of Kenya & Another [2005] KLR 828**.

20. The 2nd Respondent in its submissions dated 28th September 2018 and filed on 1st October 2018, frames the following as the issue for determination: whether in observing the orders in Misc. 131 of 2017, Petition No. 107 of 2017 and Petition No. 10 2018, the 2nd Respondent disobeyed the Judgment of 2nd September 2017 in Petition No. 28 of 2016 thus being in contempt of Court.

21. The 2nd Respondent submits that it has acted reasonably towards the observance of all the orders issued. It relies on the cases of **Hadkison vs. Hadkison [1952] 2 All ER**, **Katsuri Limited vs. Kapurchand Depar Shah [2016] eKLR** and **Teachers Service Commission vs. Kenya Union of Teachers & 3 Others [2015] eKLR**. The Respondent further submits that its actions do not constitute contempt of court because its actions have been restrained by pending court cases and resultant circumstances.

22. The 2nd Respondent submits that the Secretary General cannot be held in contempt of court because he does sanction elections for the 2nd Respondent. As such, the application is premature and devoid of merit as the orders sought cannot be enforced against the him. The 2nd Respondent further submits that the Secretary General has not been cited as a party to the proceedings hence no adverse orders should be made against him.

23. It is the 2nd Respondent's submissions that the Petitioner has not demonstrated how the 2nd Respondent willfully disobeyed the court order.

24. The 1st Respondent in his written submissions dated 1st October 2018 and filed on 2nd October 2018, submits that the 1st Respondent is not in contempt of court because its actions have been restrained by pending court cases and resultant circumstances.

25. The 1st Respondent further submits that contempt of Court proceedings are quasi criminal in nature and it is upon the Applicant to prove his allegations beyond a reasonable doubt.
26. I have examined all the averments and submissions of both parties. It is true that on 2.9.2016 the Hon. J. Ndolo made orders directing the 2nd Respondent herein to conduct elections for the position of Assistant Treasurer within 60 days from the date of the Judgement.
27. The 1st Respondent was barred from contesting in the said elections as long as he holds the position of office of MP.
28. On 30.6.2017, the orders to hold election as earlier directed were extended for 30 days.
29. On 7/10/2017, I gave orders of stay of orders and of the decree dated 2.9.2016 pending further orders before J. Ndolo on 20/7/2017.
30. On 20/7/2017, when the parties appeared before J. Ndolo, she made a finding that she had already determined the issue of stay pending appeal and therefore the Court was functus officio.
31. On 7/8/2017, the Honourable Court again extended time for holding the elections as earlier ordered for 60 days. As it were, there were no further orders staying the conduct of the said elections after the expiry of the 60 days from 7/8/2017.
32. The Respondents aver that they could not conduct the elections as ordered. The Respondents contend that they had difficulty in conducting elections as ordered by Court as the 1st Respondent obtained orders debarring the Registrar from expunging his name from the 2nd Respondent's register.
33. The 1st Respondent also indicated that he filed an Appeal No. 311 of 2011 before the Court of Appeal which appeal is still pending. The 1st Respondent further aver that there are 2 orders of this Court in Petition No. 107/2017 and 10/2018 both precluding the alteration of the 2nd Respondent until the Petitions were heard and determined and which Petitions are pending in Court.
34. The Respondent attached an order in Misc. 131/2017 from this Court which order was issued by J. Mbaru on 16/10/2017 compelling the Respondent to suspend the By-election scheduled for 2/10/2017 for the post of Assistant national Treasurer pending hearing and determination of the suit and an order compelling the Respondent to issue a fresh notice of the said By-election.
35. Orders alleged in Petition No. 107/2017 and 10/2018 were also annexed to the application.
36. What emerges is that there are a number of Court cases pending before Court on the issue of the election filed by different Parties and also an Appeal pending before the Court of Appeal on the same issue. There are a total of 5 different orders in different files in relation to the issue of the elections. The orders in the other cases/petitions definitely affect the issue of the holding of the pending election.
37. It is therefore my finding that the application before me cannot succeed in view of the pending cases where contrary orders have been given. I will therefore dismiss this application accordingly and urge the parties to try and amicably resolve the issues in question.
38. There will be no order as to costs.

Dated and delivered in open Court this 12th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odhiambo holding brief Mariaria for 1st Respondent – Present