



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 110 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th April, 2019)

IN THE MATTER OF THE EXPORT PROCESSING ZONES ACT, STATE CORPORATIONS ACT, FAIR ADMINISTRATIVE ACTION, EMPLOYMENT ACT, ARTICLES 20, 21, 22 AND 23 OF THE CONSTITUTION OF KENYA,

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 41 AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

FANUEL ODEDE KIDENDA.....PETITIONER/APPLICANT

VERSUS

CABINET SECRETARY, MINISTRY OF INDUSTRY,

TRADE & CO-OPERATIVES, HON PETER G. MUNYA, MGH.....1st RESPONDENT

EXPORT PROCESSING ZONES AUTHORITY KENYA.....2nd RESPONDENT

GEORGE MAKATETO.....3rd RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The Application before Court is the one dated 1st February, 2019. The Application was filed under a Certificate of Urgency through a Notice of Motion filed Under Section 4 (1) (a), 5, 7, 30 of the Contempt of Court Act, Section 5 (2) , 8 Export Processing Zones Cap 517 and all other enabling provisions of the law.

2. The Application seeks the following Orders:-

1. THAT this Application be certified as urgent and heard ex-parte in the first instance.

2. THAT this Honourable Court does issue a thirty (30) day notice to the 3rd Respondent/ 1st Alleged Contemnor, Mr. George Makateto to show cause why contempt of court proceedings should not be commenced against him for failing to comply with the order of this Court issued on 11th December, 2018 requiring the 2nd Respondent to facilitate the payment of the Applicant's salary up to December 2018.

3. THAT this Honourable Court does issue a thirty (30) day notice to the 2nd Alleged Contemnor, Mr. Paul Gicheru to show cause why contempt of Court proceedings should not be commenced against him for obstructing the compliance and or causing disobedience of the orders of this Court issued on 11th December, 2018 requiring the 2nd Respondent to facilitate the payment of

the Applicant's salary up to December 2018.

4. THAT this Honourable Court finds that Mr. George Makateto and Mr. Paul Gicheru be committed to civil jail for 6 months for obstructing compliance/ causing disobedience and/or failing to comply with the order of this Court issued on 11th December 2018 requiring the 2nd Respondent to facilitate the payment of the Applicant's salary up to December 2018.

5. THAT any other relief this Honourable Court shall deem fit to grant in lieu of (4) above.

6. THAT costs of this Application be provided for.

3. This Application is premised on the grounds that:-

i. The Alleged Contemnors have constructively and wilfully continued to interfere, obstruct and interrupt the due process of the administration of justice in as far as observance of the orders of this Honourable Court are concerned.

ii. As a consequence of these deliberate actions by the alleged contemnors the authority of this Honourable Court is being undermined by one Mr. George Makateto and Mr. Paul Gicheru individually and jointly.

iii. Contemporaneously with contempt towards this Honourable Court, the Applicant has yet to be paid any of his dues that are owed to him as a matter of right causing him great distress and anguish.

iv. The Alleged Contemnors have misapprehended or have been misadvised as to the nature of the Court Orders as they erroneously believe that because they are attempting to challenge the propriety of the orders of this Court they can ignore and disregard the same.

v. Unless this Application is urgently heard and allowed as prayed, the Applicant's rights shall continue to be infringed upon and this Court's authority will stand undermined.

4. The Application is supported by the Affidavit of **FANUEL ODEDE KIDENDA** sworn on 31st January, 2019 in which he reiterates the averments made in the Notice of Motion Application.

5. In opposition to the Application the firm of Wekesa & Simiyu Advocates on record for the 2nd, 3rd Respondents and the 2nd alleged Contemnor filed various documents as discussed below.

6. Firstly, on the behalf of the 2nd and 3rd Respondents Counsel filed Grounds of Opposition to the Application dated 21st February, 2019 in which the following grounds are raised:-

1. THAT the 3rd Respondent and the 2nd Alleged Contemnor have not obstructed and/or caused disobedience and/or failed to comply with the order of the Court of 11th December, 2018;

2. THAT the Application filed herein is misconceived, incompetent, incurably defective, bad in law, an abuse of the court process of this Honourable Court and only intended to embarrass and/or embarrass the officers of the 2nd Respondent;

3. THAT the Order of the Court of 11/12/2018 alleged to have been disobeyed was not directed against the 2nd Respondent the principal party in the proceedings and of whom the 3rd Respondent is its Acting Chief Executive Officer and the 2nd Alleged Contemnor its Chairman;

4. THAT the Export Processing Zones Authority envisaged as the misnamed 2nd Respondent is defined by Section 3 (2) and (3) of the Export Processing Zones Act Cap 517 of the Laws of Kenya and is not the 2nd Alleged Contemnor;

5. THAT the Petitioner/Applicant has not alleged any contempt of the Court Order of 11/12/2018 as against the 2nd Respondent and yet alleges contempt against the 3rd Respondent and the 2nd Alleged Contemnor;

6. THAT the Court Order at issue had condition precedents attached to it and the Petitioner/Applicant has not demonstrated that those condition precedents were satisfied before rushing to assert disobedience of the order as against the 3rd Respondent and the 2nd Alleged Contemnor;

7. THAT the Petitioner/Applicant by its pleadings admitted that he was no longer working for the 2nd Respondent and sought by his Notice of Motion dated 8/10/2018 for a mandatory injunction, yet to be granted, for the 1st and 2nd Respondents to rescind the appointment of the 3rd Respondent as Acting Managing Director and reinstate the Petitioner as the Chief Executive Officer of the 2nd Respondent;

8. THAT the 3rd Respondent has since 21/09/2018 been acting Chief Executive Officer of the 2nd Respondent and which fact is admitted by the Petitioner/Applicant;

9. THAT the Order the Petitioner/Applicant alleges disobedience is not clear and unambiguous;

10. THAT the Order of the Court complained off did not direct the 2nd Respondent to do what the Petitioner/Applicant claims the 2nd Respondent has failed to do and therefore ought to be cited as in disobedience of the Order;

11. THAT the breach for which the alleged contemnors are cited is not defined;

12. THAT the Notice of Motion is incompetent, bad in law and for dismissal for want of jurisdiction;

13. THAT the Petitioner/Applicant has not demonstrated beyond any reasonable doubt as required under the law on how the 2nd Respondent and/or its cited officers have disobeyed the Order of the Honourable Court made on 11th December, 2018.

7. Secondly, on behalf of the 3rd Respondent and the 2nd Alleged Contemnor the firm filed a Notice of Preliminary Objection dated and filed in Court on 27th February, 2019 on the following grounds:-

1. The Notice of Motion is incurably incompetent and bad in law as it is premised on an unconstitutional void Act of Parliament and this Court has no jurisdiction to hear and determine the same and the Motion is therefore for dismissal/striking off in limine with costs.

8. Thirdly, Counsel on record further filed a Replying Affidavit sworn by **THOMAS MONGARE**, the Manager Human Resource and Administration of the Export and Processing Zones Authority, the 2nd Respondent herein, sworn on 21st February, 2019 and filed in Court on 25th February, 2019 in which he avers that the 2nd Respondent is in fact in compliance with the Order of the Court as it has not declared the position of Chief Executive Officer of the 2nd Respondent vacant and has equally not undertaken any recruitment process with the view of filling the position in compliance with Order (a) of 11/12/2018.

9. He further avers that the 3rd Respondent was appointed to fill the position in an Acting capacity in further compliance with Order (b) of the Court Order. He further avers that the Order on payment of the Petitioner's salary for work already done up to December, 2018 on the other hand was not directed to the 2nd Respondent.

10. The 2nd Respondent contends that it duly paid the Petitioner his salary for the services rendered to it. It is further contended that the salary for the 20 days worked in September, 2018 was payable upon the Petitioner clearing with the 2nd Respondent, which is yet to be done. Further, that the Petitioner is indebted to the 2nd Respondent Kshs.760,480/-.

11. The 2nd Respondent avers that the amount owing to the Petitioner on the other hand is Kshs. 624,666.67/-. Leaving an unpaid debt owed to the 2nd Respondent by the Petitioner should the amount be used to pay off his debt at Kshs. 318,009.63/-. The 2nd Respondent further avers that the Petitioner failed to render any services to it during the period 21st September, 2018 to December, 2018 and as such cannot be paid and that the only payment that can be effected would be from 1st September, 2018 to 20th September, 2018.

12. The 2nd Respondent contends that it is therefore not in contempt of the Court Order issued on 11/12/2018 as alleged by the Petitioner/Applicant.

13. The 2nd Respondent further contends that under the auspices of Section 8 of the Export Processing Zones Act Cap 517 Laws of Kenya neither the 2nd Respondent, any of its members, officers nor servants shall be personally liable for an act done or purported to be done in good faith by such a person, which its officers have been doing.

14. The 2nd Respondent urged the Court to dismiss the instant Application with costs to the Respondents.

15. Fourthly, Counsel on record further filed a Replying Affidavit sworn by **PAUL GICHERU**, the Chairman of the Export and Processing Zones Authority, the 2nd Respondent herein, sworn on 21st February, 2019 and filed in Court on 25th February, 2019, in which he avers that he is not aware of any formal application made to the Court seeking to enjoin him as a party to this Claim. It is his submission that he has been wrongfully enjoined as a party to the Application now before this Honourable Court.

16. He further avers that he has dealt with Mr. George Makateto, the 3rd Respondent herein in an Acting capacity in the position of Chief Executive Officer. He added that he is not familiar with the Petitioner herein having been appointed Chairman to the Export Processing Zones Authority with effect from 20th September, 2018.

17. He further avers that the Petitioner did not work for the Authority up to December 2018 a fact, which the Petitioner admits to in his Application dated 8th October, 2018.

18. He contends that he is not vested with the legal responsibility of paying salaries which is purely an administrative function which is not vested on the Chairman of the Export Processing Zones Authority. He further contends that the Petitioner has not produced before the Court any resolution, letter or other document indicating that the Chairman or any member of the board has violated an Order issued by the Court.

19. He insisted that he is not in contempt of any Court Order issued by this Honourable Court on 11th December, 2018 and urged the Court to

dismiss the instant Application with Costs to the Respondents.

20. Fifth, Counsel on record further filed a Replying Affidavit sworn by **GEORGE MAKATETO**, the Acting Chief Executive Officer of the Export and Processing Zones Authority, the 2nd Respondent herein, sworn on 21st February, 2019 and filed in Court on 25th February, 2019. In which he adopts the averments made in the Replying Affidavits sworn by Paul Gicheru and Thomas Mongare in response to the Application now before this Honourable Court.

21. He further avers that the 2nd Respondent's corporate accountability on the Authority is set out at Section 3 of the Export and Processing Zones Act Chapter 517 Laws of Kenya and not on himself or the 2nd Alleged Contemnor.

22. He contended that his actions have been in good faith and as such he is protected under Section 8 of the Export and Processing Zones Act. Further, he contended that he has not in any way obstructed compliance/ caused disobedience and/or failed to comply with any Court Order as alleged by the Petitioner.

23. In Conclusion the deponent urged the Court to dismiss the instant Application with Costs to the Respondents.

24. The Petitioner subsequently filed a further Affidavit sworn by **FANUEL ODEDE KIDENDA** sworn on 27th February, 2019 and filed in Court on 28th February, 2019 in response to all the Replying Affidavits filed by the Respondents hereto. In the Affidavit, the Petitioner reiterates the averments made on the face of the Notice of Motion Application now pending before this Honourable Court.

25. He further avers that the 1st Alleged Contemnor is the accounting officer of the 2nd Respondent and therefore has failed to prove good faith on his part to demonstrate obedience to the Court Order of 11th December, 2018. He added that the said Orders remain disobeyed and ignored by the 2nd Respondent to date.

26. In response to the 2nd Alleged Contemnor, the Petitioner averred that the 2nd Contemnor has been at the helm of the board since October 2018 yet he failed to produce any evidence of any board resolution or minutes confirming the deliberations of the Court Order of 11th December, 2018. He further failed to avail any evidence granting him authority to file the Notice of Motion Application dated 20th December, 2018.

27. The Petitioner further averred that the 2nd contemnor's actions are in complete disregard to the Court Orders issued on 11th December, 2018 and he urged the Court to find him, the 2nd contemnor, guilty of contempt.

28. In Conclusion, the Petitioner contended that the Respondents and the Alleged Contemnors are guilty of gross infringement of his socio-economic human rights as they continue to be in contempt of the Court Order of 11th December, 2018.

29. The Petitioner urged the Court to allow the Application as prayed.

In disposing of the instant Application, the parties agreed to file written submissions.

Petitioner's/Applicant's Submissions

30. It is the Petitioner/Applicant's submission that despite the voluminous submissions made by the Respondent and the Alleged Contemnors the Court Order of 11th December, 2018 have not been complied with. The Petitioner to fortify this position relied on the Authority of **Constitutional Petition 87 of 2017 Kenya Human Rights Commission Vs Hon Attorney General and the Law Society of Kenya** where it was stated:-

"The constitution commands, Orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of the state may interfere in any matter, with the functioning of the Courts. It follows from this that the disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of Court Orders and decisions is substantially determined by the assurance that they will be enforced."

31. Similarly, the Petitioner relied on the Canadian case of **Canadian Metal Co. Ltd Vs Canadian Broadcasting Corp (No. 2) (1975) 48 D.L. R (30)** in which the Court made an observation that:-

"To allow Court Orders to be disobeyed would be to tread the road towards anarchy. If orders of the Court can be treated with disrespect, the whole administration of justice is brought into scorn...if the remedies that the Court grant to correct...wrongs can be ignored, then there will be nothing left for each person but to take the law in to his own hands. Loss of respect for the courts will quickly result into the destruction of our society."

32. The Petitioner further submitted that this Honourable Court, ought to jealously guard the process of administration of justice and maintain dignity and respect. It therefore has an obligation to commit all individuals who deliberately fail to carry out Orders issued by the Court.

33. The Petitioner contends that the Court Orders of 11th December, 2018 remain unactioned warranting the instant Application no before

this Honourable Court. It is further submitted that existence, service and knowledge of the said Orders is not disputed by the Respondents and the Alleged Contemnors and that they are guilty of wilful refusal to obey the Court Orders.

34. In conclusion the Petitioner urged the Court to allow the instant Application in terms of prayer 4, 5 and 6 and that the same be granted as Orders of the Court.

2nd, 3rd Respondents and the 2nd Alleged Contemnor's Submissions

35. It is the Respondents' Submission that the Notice of Motion Application is without any legal foundation and that no provision of the law cited thereto gives this Honourable Court jurisdiction to issue the prayers as prayed.

36. It is further submitted the Order with regards to payment of the Petitioner's salary was not directed at the 2nd Respondent thus the same was ambiguous. With regards to the 1st and the 2nd Order which were specifically directed to the 1st and 2nd Respondent hereto it is the Respondents' position that the said Orders have been complied with as Ordered by this Honourable Court.

37. It is further argued by the Respondents that the Petitioner did render any services to the 2nd Respondent up to December, 2018 as his contract lapsed and that further the 3rd Respondent has been handling the position in an acting capacity as from 21st September, 2018 and is therefore not entitled to salary in fact the Respondents argue that it is the Petitioner who is indebted to the 2nd Respondent.

38. The Respondent further submitted that prayer 4 of the Notice of Motion Application is incapable of being determined with prayer 2 and 3. They further urged that this Honourable Court ought to first decide whether it should issue a thirty days' notice to the 3rd Respondent and improperly enjoined Paul Gicheru for commencement of contempt of Court proceedings against them for failure to comply with the Court Orders issued on 11th December, 2018.

39. The Respondents further submitted that the is unfairly directed at only two persons yet the Export Processing Zones Authority of Kenya comprises of various entities as provided for under Section 3 (2) (3) of the Export Processing Zones Act, Cap. 517 Laws of Kenya. Further, that the corporate accountability is on the Authority as set out in Section 3 of the Export Processing Zones Act. For emphasis the Respondents relied on the Authority of **Sam Nyamweya & 3 Others Vs Kenya Premier League Ltd & 2 Others (2015) eKLR** where the Court held that:-

“Acknowledging that the power of the Court to punish for contempt is intended to protect the dignity and authority of the Court, and not intended to be used as a weapon for parties to intimidate the adversary party, I find an improper motive on the part of the applicant to single out only the 1st defendant's Directors/Respondents herein for citation without offering an explanation why the other defendants were not cited, yet the order was generally addressed to the Defendants/Respondents without specifying which Defendant or Respondent.”

40. The Respondents contended that there is no dispute as to the existence of the Court Order of 11th December, 2018 in fact they confirm compliance with the first two aspects of the said Order that were directed on the 1st and 2nd Respondent respectively what remains is the issue of **“The Petitioner be paid his salary for work already done up to December 2018”** which is what the Respondent argue was ambiguous and was not directed to a particular Respondent. For emphasis the Respondents relied on the case of **Rose Detho Vs Ratilal Automobiles & Others (2018) eKLR** where the Court of Appeal stated:-

“It is trite law that before a person is cited for contempt, the Court must be satisfied that the impugned Order is clear and unambiguous.”

41. To further fortify their argument on clarity of the Order the Respondents cited the following authorities **Jihan Freighters Limited Vs Hardware & General Stores Limited (2015) eKLR**, **Alken Connections Limited Vs Safaricom Limited & 2 Others (2013) eKLR** and **Salome Nyambura Kangethe T/A Shalom Enterprises & 13 Others Vs Nairobi City Council & 8 Others (2016) Eklr**.

42. The Respondents further contended that for contempt of court proceedings the standard of proof is higher than that of a civil matter and that the Petitioner has not proved his case. For emphasis the Respondents relied on the case of **Gatharia K Mutitika & 2 Others Vs Baharini Farm Limited (1985) KLR 227** where it was held that the ***Standard of proof in contempt proceedings must be higher than the proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt and that the standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases.***

43. In Conclusion, it is the Respondent's Submission that the instant Application is predicated on quicksand and a total misapprehension of the Order of the Court by the Petitioner and that it does not invoke the relevant provisions of law. They further submit that neither the Respondents nor the alleged contemnors have disobeyed the Court Orders of 11th December, 2018 and that the same ought to be dismissed with costs to the Respondents.

2nd, 3rd Respondents and the 2nd Alleged Contemnor's Submissions on their Preliminary Objection dated 27th February, 2019

44. The Respondents herein raised a Preliminary Objection to the Notice of Motion Application dated 1st February, 2019, now pending before this Honourable Court.

45. The Respondents submits that their preliminary objection is on the ground that the provisions of the law under which the Petitioner/Applicant seeks relief in his Notice of Motion Application are a nullity by virtue of the entire Act been declared by the High Court

on 9th November, 2018 as being inconsistent with the Constitution and therefore null and void. They further submitted that the Application being premised on a non-existent law and that this Honourable Court has no Jurisdiction to entertain the same.

46. They further submitted that the Preliminary Objection raised is within the confines of a Preliminary Objection as it raises purely points of law and is within the meaning as highlighted in the Authority of **Mukisa Biscuit Manufacturing Co. Ltd Vs Westend Distributors Ltd (1969) E.A 696.**

47. It is further submitted that the instant Application being premised on a non-existent law is bad in law, is incompetent and amounts to an abuse to the process of this Honourable Court. It is the Respondents' further submission that this Court has no jurisdiction to entertain the instant Application and the Application ought to be dismissed with costs to the Respondents. For emphasis the Respondents' cited that cases of **In the Matter of Interim Independent Electoral Commission (2011) eKLR** and **Owners of Motor Vessel 'Lillian S' Vs Caltex Oil (Kenya) limited (1989) KLR 1.**

48. The Respondents' aver that the provisions of the Export Processing Zones Act, Cap 517 Laws of Kenya cited by the Petitioner/Applicant on the face of the Application does not give any jurisdiction to this Honourable Court to adjudicate to contempt of court proceedings.

49. The Respondents' further aver that the Jurisdiction of the Court cannot be assumed through pestering by an Applicant therefore the instant Application having no feet to stand ought to be dismissed with costs to the Respondents'. For emphasis the Respondents' cited the **Authority of Michael Mungai Vs Housing Finance Co. (K) Ltd & 5 Others (2017) eKLR.**

50. It is further submitted that the Preliminary Objection raised is not a mere technicality issue that can be wished away by invoking the provisions of Article 159 of the Constitution as the Jurisdictional issue goes to the root and heart of the instant Application and lack of such jurisdiction is not a mere technicality.

51. In conclusion, the Respondents' urged the Court to dismiss the instant Application with Costs to the Respondents.

52. I have examined all the averments of both parties. I will first address the issue raised in the Preliminary Objection, which is to the effect that the application in Court is based on a non-existent law and is therefore null and void.

53. The Applicant in the Preliminary Objection indicate that the Notice of Motion Application is stated to be brought under Section 4(i) (a) 5, 7, 30 of the Contempt of Court Act, 2016, Section 5(2) and 8 of the Export Processing Zones Act Cap 517 Laws of Kenya.

54. The Applicants contend that in **Kenya Human Rights Commission vs The Attorney General & Another (2018) eKLR**, the High Court on 9th November 2018 declared Section 30 and 35 of the Contempt of Court Act inconsistent with the Constitution and therefore null and void and also declared the entire Act invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution and encroaches on the independence of the Judiciary.

55. It is indeed true that in the impugned judgement of **Kenya Human Rights Commission vs The Attorney General** (supra) the High Court (Hon J. E. Mwita) declared the entire Contempt of Court Act 2016 unconstitutional.

56. That being the correct position it follows that the entire application before me is hanging in the air without any feet to stand upon.

57. The application is therefore unsustainable and must hence be determined and is hereby struck out. I would therefore not delve into other issues raised in the application. There will be no order as to costs.

Dated and delivered in open Court this **30th day of April, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odukenya holding brief Kinyua for Applicants – Present

Respondent – Absent