



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1118 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 13th June, 2019)

OIGALA HENRY OANYA CLAIMANT

VERSUS

KENYA METHODIST UNIVERSITY.....RESPONDENT

RULING

1. Before this Court is the Claimant's Application dated 4th February 2019 seeking the following Orders:-

a. Spent.

b. THAT pending the inter partes hearing of this Application an interim preservation order do issue to stay or suspend the operation and effect of the Respondent's letters dated 11th January 2019 transferring the Claimant to Mombasa Campus.

c. THAT pending the hearing and determination of this Application and the main suit an interim preservation order do issue to stay or suspend the operation and effect of the Respondent's letters dated 11th January 2019 giving notice to transfer the Claimant.

d. THAT this Honourable Court be pleased to hold the Respondent in contempt of the Court orders issued on 19th June 2017 and 12th July 2017 particularly the Vice Chancellor and the Human Resource Manager for their committal in prison for a period not exceeding 6 months for willful disobedience of the Court Order granted by the Honourable Lady Justice Wasilwa in the Cause herein.

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

2. The Application is based on the grounds that the Respondent issued the Applicant with a letter transferring him from Nairobi to Mombasa, thus ignoring the consent orders issued by this Honourable Court.

3. Further, the Respondent has never reinstated the Applicant despite being ordered to do so two years ago and his monthly salary is paid late and in an irregular manner. The Applicant is apprehensive that the transfer is in bad faith aimed at defeating his rights as an employee.

4. The Application is supported by the Affidavit of Oigala Henry Oanya sworn on 4th February 2019 and is based on the grounds on the face of the Motion save that the Applicant had earlier objected to the transfer because the Respondent failed to address the issues raised in his letter of 30th January 2019.

5. The Respondent has opposed the Application vide the Grounds of Opposition dated 18th February 2019. The Respondent avers that the Application is misconceived as it is a misapprehension of the law and Court orders issued on 19th June 2017 and 5th October 2017 which have not precluded the Respondent from implementing operational decisions such as transferring of teaching staff.

6. Further, the Application is fatally defective as it does not disclose how the Respondent has willfully disobeyed or breached the orders issued. It is the Respondent's position that the Application is vexatious as it has been brought in bad faith.

7. The Respondent further opposed the Application vide the Replying Affidavit of Lilian Mutuma sworn on 29th March 2019. She avers that since the issuance of the aforementioned orders, the Applicant has been retained to work with the Respondent and has not been terminated. As such, the Respondent has been fully compliant with the orders.

8. It is the Respondent's position that the decision to transfer the Applicant was made pursuant to Article 14 (5) (2) (e) (f) and (h) of the Kenya Methodist University Chapter, being in the best interest of the University. The decision is therefore lawful and regular as the Respondent properly acted within its powers. Further, the Applicant was given ample notice for handover and relocation.

9. The Applicant filed a rejoinder to the Grounds of Opposition vide his Supplementary Affidavit sworn on 4th April 2019 wherein he reaffirms the averments in his Supporting Affidavit. He further avers that the letter seeking to transfer him was stayed vide the Interim Orders issued on 7th February 2019 and transferring him will only cause anxiety, expenses and trouble.

Submissions by the Parties

10. The Application was disposed of by way of written submissions. The Applicant filed his submissions on 2nd May 2019, while the Respondent filed theirs on 14th May 2019.

11. The Applicant submitted that Court Orders are meant to be complied with. It is his position that if the Respondent was having difficulties in complying, it should have explained the challenges to the Court. He relies on the cases of **Hadkinson vs. Hadkinson [1952] 2 All ER 567, Econet Wireless Kenya Limited vs. Minister for Information & Communication of Kenya & Another [2005] 1KLR 828 and Board of Governors, Moi Girls High School Kabarak vs. Malcolm Bell [2013] eKLR** where the respective Courts held that Court orders must be complied with and those who fail to do so shall be punished.

12. The Applicant also submits that the Applicant should be committed to civil jail for disobeying its orders, which contained a penal notice in the event they were disobeyed.

13. The Respondent has submitted that it has complied with the Orders issued on 19th June 2017 as the Applicant has been retained as its employee since the issuance of the said orders. Further, the Respondent submits that the Applicant ought to prove beyond a reasonable doubt that indeed it failed to comply with the orders issued and relies on the case of **Sam Nyamweya & 3 Others vs. Kenya Premier League Limited & 2 Others [2015] eKLR and Ringera & 2 Others vs. Muite & 10 Others HCCC 1330 of 1991** which outlined the threshold to be met before someone is held in contempt.

14. It is the Respondent's submission that the Applicant has placed reliance upon the Contempt Act No. 46 of 2016 which was declared invalid by the Court in **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR**. As such, the Application is fatally incompetent to the extent that it is grounded upon statute that was declared incompetent.

15. I have examined the submissions and averments of the Parties herein. The Applicant filed this application under the Contempt of Court Act No. 46 of 2016, which Act, was declared invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution and encroaching on Independent of the Judiciary by J. Hon. Mwita in **Kenya Human Rights Commission v Attorney General and Another (2018) eKLR**.

16. Due to this fact, this application is fatally defective and I proceed to strike it out.

Dated and delivered in open Court this **13th day of June, 2019**.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Muna holding brief Kimani for Applicant – Present

No appearance for Respondent