



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 137 OF 2018

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLES 27, 41 AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF THE EXPORT PROCESSING ZONES ACT, CAP 517 LAWS OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

THOMAS OMBASA SOIGWA.....1st PETITIONER

BENTER ACHIENG OMOLLO.....2nd PETITIONER

VERSUS

EXPORT PROCESSING ZONES AUTHORITY.....RESPONDENT

RULING NO. 2

1. In a Petition lodged with the Court on 18 December 2018, the Petitioners herein challenged the decision of the Respondent (2nd and 3rd Respondents were struck out of the proceedings) to send them on *compulsory leave* of 90 days to enable the conducting of investigations into alleged procurement irregularities.

2. The Petitioners contended that the *compulsory leave* was misconceived, bad in law, devoid of merit and contravened express contractual provisions and the right to work, discriminatory and unlawful and thus null and void.

3. Filed with the Petition was a motion under certificate of urgency seeking preservative/conservatory orders interdicting the decision to send the Petitioners on *compulsory leave* pending the hearing and determination of the Petition.

4. When the application was placed before the Wasilwa J on 19 December 2018, the Court ordered

1. **THAT** the application is hereby certified urgent.

2. **THAT** the application be served upon the Respondents for hearing inter partes on 21 January 2019 in any Court.

3. **THAT** status quo be maintained.

5. On 18 June 2019, the Petitioners filed an application alleging that 2 named officers of the Respondent had violated the *status quo* order by commencing disciplinary action against them on 29 May 2019.
6. When served with the contempt application, the Respondent filed Grounds of Opposition, replying affidavits deposed by George Makaketo and Paul Gicheru. The Respondent also filed List of Authorities.
7. The Petitioners application was urged on 11 July 2019 and the Court reserved Ruling to 16 July 2019.
8. Unfortunately, the Court had to attend to other official engagements and the Ruling was rescheduled to today.
9. The Court has perused the record and considered the application, the grounds of opposition, the replying affidavits and submissions.
10. *Status quo* is a Latin maxim which means according to Black's Law Dictionary 10th edition the situation that currently exists.
11. Although an ambiguous legal concept, *status quo* has been the subject of deliberations by Courts in this jurisdiction. One such deliberation was by the Court of Appeal in *Kiru Tea Factory Company Ltd v Stephen Maina Githiga & 14 Ors* (2019) eKLR.
12. In the instant case, the situation that existed when the Petitioners moved the Court was that they were already serving *compulsory leave*, having been sent on *compulsory leave* on 22 November 2018.
13. It is the understanding of this Court therefore that the *status quo* order of 19 December 2018 did not restore a *status quo ante* the decision to send the Petitioners on *compulsory leave*. The Court order did not have the effect of reversing or staying the decision to send the Petitioners on *compulsory leave* but to so to speak, keep them on *compulsory leave* until further orders of the Court.
14. But a legal/factual difficulty ensues.
15. The Petitioners were to serve 90 days on *compulsory leave*. The 90 days expired on or around 21 February 2019.
16. As a legal proposition, could the *status quo* orders outlast or survive beyond the 90 days *compulsory leave*?
17. There is in the view of the Court, a tension between the *status quo* order, law and common sense which can only be resolved by reverting back to the Petitioners contractually agreed terms and conditions of service upon which the Petitioners served and the pleaded cause of action.
18. In the natural course of the contractual relationship between the Petitioners and the Respondents, the *compulsory leave* was time bound. It was to facilitate the carrying out of investigations. The Respondent did not take any decision to extend the *compulsory leave*.
19. The *compulsory leave* was to enable investigations to establish facts which could lead to a disciplinary process.
20. An investigatory process and a disciplinary process within the employment relationship therefore serve different purposes and objectives. If the investigation don't establish the facts to commence a disciplinary process, that would be the end of the matter.
21. In the case at hand, there was no express order restraining the Respondent from commencing disciplinary action against the Petitioners after the factual situation the Court sought to preserve through the *status quo* order dissipated. The *compulsory leave* dissipated after 90 days rendering the *status quo* order superfluous.
22. Further, the Petition, as drafted, set out facts which did not spread beyond the *compulsory leave* decision. There was no substantial challenge to anticipated disciplinary action or process.
23. However, put into the context of the legal wrong/legal injury allegedly suffered by the Petitioners as set out in the Petition, it is the view of this Court that disciplinary process commenced in May 2019 would not amount to contempt of court.
24. Therefore, the Court finds no wilful disobedience of the *status quo* order.
25. The Respondent however advanced another argument that the *status quo* order issued on 19 December 2018 lapsed when the Court failed to extend it after 21 January 2019.
26. The *status quo* order was not time bound (the Court did not indicate when it was to lapse when initially issued), and therefore the challenge by the Respondent that it lapsed because it was not extended during subsequent Court appearances is not a valid argument.
27. The Court finds no merit in the application filed in Court on 10 July 2019 and orders it dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 17th day of July 2019.

Radido Stephen

Judge

Appearances

For Petitioners Ms. Katile instructed by Musa Juma & Co. Advocates

For Respondent Mr. Kisaka led by Mr. Wekesa instructed by Wekesa & Simiyu Advocates

Court Assistant Lindsey