



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 998 OF 2018

DR EDWIN GICHANGI.....CLAIMANT

VERSUS

KENYA CULTURAL CENTRE.....RESPONDENT

RULING NO. 3

1. On 8 March 2019, the Court delivered a ruling in respect of an application dated 18 December 2018 which had been filed by the Claimant seeking to commit some named persons to civil jail for contempt of Court.

2. The Respondent then moved the Court on 13 March 2019 seeking review of the Ruling on account that its case as exhibited in a replying affidavit sworn by one Nicholas Ole Moipei had not been considered.

3. Upon hearing of the review application, the Court on 27 March 2019 allowed the application and directed that it would render a ruling today after considering the Respondent's contentions.

4. This Ruling therefore is in respect of an application dated 18 December 2018 by Claimant seeking orders

a.

b. An order of committal to be made against **OLE MOIPEI NICHOLAS M who is the Chairman to the Governing Council of the Respondent** and **Mr. Benson Kimoni who is the acting Chief Executive Officer of the Respondent** to prison for such period as this Honourable Court may deem fit and just and fined accordingly in that they, the said **OLE MOIPEI NICHOLAS M** and **Mr. Benson Kimoni**, have disobeyed the Order made herein by this Honourable Court on the 5th day of July 2018 compelling and directing the Respondent herein **to unconditionally lift the suspension of the Claimant from employment and order for his immediate reinstatement and restoration of all assets bestowed on the Claimant by virtue of his office.**

c. ..

d.

5. When served with the application, the Respondent filed a Notice of Preliminary Objection in the following terms

1. **THAT** the Application is res judicata, a similar one having been lodged on 20 July 2018, heard inter partes on 31 October 2018 and a Ruling thereon delivered on 13 December 2018 dismissing the same with no orders as to costs.

2. **THAT** the Application offends the principle against double jeopardy enshrined in Article 50(2)(o) of the Constitution hence is unconstitutional and violates the Respondent's rights to a fair hearing, to the Respondent's detriment.

3. **THAT** the Application is res judicata, a similar one having been lodged on 20 July 2018, heard inter partes on 31 October 2018 and a Ruling thereon delivered on 13 December 2018 dismissing the same with no orders as to costs.

2. **THAT** the Application offends the principle against double jeopardy enshrined in Article 50(2)(o) of the Constitution hence is unconstitutional and violates the Respondent's rights to a fair hearing, to the Respondent's detriment.

3. **THAT**

ation is frivolous and vexatious and must be dismissed forthwith, with costs.

6. The Court took arguments on both the application and the Preliminary objection.

7. The Court will first address the legal questions posed in the preliminary objection.

Res judicata

8. The Respondent's objection on *res judicata* was predicated on a ruling delivered on 13 December 2018.

9. The ruling was in respect of an application dated 20 July 2018 by the Claimant predicated on the *Contempt of Court Act*, which was the applicable law at the time the application was heard.

10. In the said ruling, the Court did not make any definitive findings in respect of the contempt application because the substantive law upon which the application and jurisdiction of the Court flowed had been declared unconstitutional and invalid.

11. The Court therefore did not delve into the merits of the contempt application of 20 July 2018 and *res judicata* does not arise.

12. The Court would also endorse the principle set out in *George Kamau Kimani & Ors v County Government of Trans Nzoia & Ar* (2014) eKLR that *res judicata* cannot be raised through a preliminary objection but should be raised through an appropriate application where evidence can be considered.

Double jeopardy

13. The Court has not made any finding on the question of contempt nor imposed any sanction or penalty and the Court finds the objection founded on double jeopardy as lacking in substance.

The contempt application

14. The Respondent indicated that it would rely on the replying affidavit sworn by Nicholas Ole Moipei and filed in Court on 27 September 2018 in opposition to the contempt application.

15. For purposes of clarity, the Court observes that the said replying affidavit had been filed in response to a previous contempt application which the Court terminated on 7 December 2018 as a result of the High Court decision in *Kenya Human Rights Commission v Attorney General & Ar* (2018) eKLR in which the Contempt of Court Act was held invalid and inconsistent with the Constitution, 2010.

16. On 5 July 2018 the Court issued an order in the following terms THAT pending the hearing and determination of this application and Claim, an order be and is hereby allowed directing the Respondent to unconditionally lift the suspension of the Claimant from employment and order for his immediate reinstatement and restoration of all assets bestowed on the Claimant by virtue of his office.

17. According to an affidavit of service filed in Court on 10 July 2018, the Respondent was served on 5 July 2018 with and acknowledged the order through Mr. Kimoni who introduced himself as the acting Director of the Respondent. He stamped on a copy of the order.

18. On the same day, Mr. Ole Moipei Nicholas M, Chairman of the Respondent wrote to the Claimant informing him that his suspension had been lifted in compliance with the Court order and that he should report to him for further directions on 6 July 2018.

19. On 6 July 2018, the said Chair wrote an email (and a letter) to the Claimant inviting him to attend a disciplinary hearing on 9 July 2018. The invitation letter made reference to a hearing earlier scheduled for 19 June 2018.

20. The Claimant did not attend the hearing and in an email of same date, he informed the Chair that the intended disciplinary hearing was *sub judice* as the agenda involved an issue pending before the Court.

21. The Chair wrote to him on the same day informing him of his summary dismissal. He also put out a Memo to all staff informing them of the dismissal of the Claimant.

22. The test to be met by a person alleging contempt of court are replete in the law books and have been discussed in cases such as *Shimmers Plaza Limited v National Bank of Kenya Limited* (2015) eKLR; *Basil Criticos v Attorney General and 8 Others* (2012) eKLR ; *Kenya Tea Growers Association v Francis Atwoli and 5 Others* (2012) eKLR; *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi* (2016) eKLR and *Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others* (2015) eKLR.

Was there a Court order?

23. There can be no denying that this Court gave an order on 5 July 2018 directing the Respondent to reinstate the Claimant to work pending the hearing and determination of the dispute lodged with Court order.

24. It cannot be said that the order was ambiguous or not clear as it directed that the suspension of the applicant be lifted and he be restored to office.

25. The assertion in paragraph 3 of the replying affidavit by Nicholas Ole Moipei therefore that there was no order restraining the termination

of the Claimant's employment has no factual or legal backing, considering that no fresh allegations or charges were put to the applicant.

Was there service/knowledge of the Court order?

26. The next question would be whether the Respondent and/or Mr. Ole Moipei and Mr. Kimoni who are sought to be cited were served and/or were aware of the Court.

27. The answer to that question does not need much debate as Mr. Moipei actually wrote to the Claimant on 5 July 2018 informing him that he had received the Court order and was consequently lifting the suspension.

28. In the said letter, Mr. Ole Moipei directed the Claimant to report to him for further instructions.

Was there wilful disobedience of the Court order?

29. Despite having acted on the Court order, Mr. Moipei went ahead on 6 July 2018 to invite the Claimant to attend disciplinary hearing on 9 July 2018 after a previous hearing scheduled through a letter dated 19 June 2018 had aborted.

30. The Claimant replied to the invitation by Mr. Moipei to attend the disciplinary hearing on 9 July 2018 by stating in an email of even date that he would not submit to the jurisdiction of the disciplinary panel because of the Court order and pending litigation.

31. Despite the misgivings by the Claimant, the Respondent's Council met under the chairmanship of Mr. Moipei on 9 July 2018 and resolved to dismiss the Claimant from employment on the same allegations and for which a hearing appear to have aborted a month or so before.

32. If at all there were *new grounds* for taking disciplinary action against the Claimant as contended by Mr. Moipei in paragraphs 12, 13, 14, 15 and 17 of the replying affidavit, those would have constituted or required a fresh disciplinary process. It was not suggested even remotely that the Claimant was asked to respond to those *new grounds*.

33. In the view of the Court, the actions of Mr. Moipei as Chairman of the Respondent's Council was not only wilful but in bad faith. It was meant to undermine not only the dignity of the Court but to frustrate the Claimant and administration of justice.

Court order directed at Respondent not Council

34. Mr. Moipei advanced an argument that the Court order was directed at the Respondent and not the Council members and therefore he (and Council) were the wrong parties to be cited for contempt. He also contended that he was not the Accounting Officer as contemplated by the Contempt of Court Act.

35. According to Mr. Moipei, the Court order was not directed at the individual members of the Council and in any case the individual members were not personally served with the Court order.

36. It is trite law that a corporation has no soul to be damned or body capable of being sanctioned. In other words, corporations act through the instrumentality of human beings.

37. Mr. Moipei was the Chair of the Respondent's Council. The Council meeting of 9 July 2018 could only be convened at his instance. He was aware of the agenda of the meeting. He was also aware of the Court order and should have placed that fact before the Council.

38. Nevertheless and in spite of having been served/or being aware of the Court order, Mr. Moipei went ahead to superintend over an agenda contrary to a valid Court order.

39. The question of Accounting Officer and Respondent's juristic personality are therefore red herring(s).

40. The Court after considering all the facts placed before it comes to the conclusion that Mr. Ole Moipei Nicholas M was in contempt by wilfully disobeying a valid Court order he was aware of.

41. The Court does not find Mr. Benson Kimoni as having been in contempt.

42. The Court directs that Mr. Ole Moipei Nicholas M appear in Court for mitigation and sentencing on 8 July 2019.

43. Claimant to have costs of this application.

Delivered, dated and signed in Nairobi on this 5th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Majimbo/Mr. Aduda instructed by Majimbo A.G. & Co. Advocates

For Respondent Mr. Ochieng instructed by Rachier & Amollo Advocates LLP

Court Assistant Lindsey