



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 1602 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**EZIEKIEL O. OWUOR.....CLAIMANT**

**VERSUS**

**CIC INSURANCE GROUP LIMITED.....1<sup>ST</sup> RESPONDENT**

**TOM M. GITONGO.....2<sup>ND</sup> RESPONDENT**

**RULING**

The Applicant herein filed a Notice of Motion on 3<sup>rd</sup> June 2019 seeking the following Orders:

1. Spent.
2. That this Court issues summons to Tom M. Gitogo to show cause why he should not be punished by this Court for contempt of Court.
3. That Tom M. Gitogo, the Group Chief Executive Officer of CIC Insurance Group Limited, the above-named Contemnor be cited for contempt of the Court for wilfully disobeying the Order issued on 13<sup>th</sup> December 2018.
4. That Tom M. Gitogo, the Group Chief Executive Officer of CIC Insurance Group Limited, the above-named Contemnor be detained in prison for a period of six (6) months or for such period as this Court shall deem necessary for being in disobedience of the Order of this Court issued on 13<sup>th</sup> December 2018.
5. That in addition to or in lieu of such committal, the Court be pleased to order the sequestration of the properties of Tom M. Gitogo, the Contemnor herein for disobedience and/or non-observance of the Order of the Court given on 13<sup>th</sup> December 2018.
6. That costs of this Application be borne by Tom M. Gitogo, the Contemnor herein.

The application is premised on grounds that:-

1. This Court issued an Order on 13<sup>th</sup> December 2018 and 18<sup>th</sup> December 2018 that the *status quo* be maintained and further directed that no further action should be taken against the Applicant pending the inter-partes hearing of the application.
2. The Contemnor being in breach of the Order and without justification has withheld the Applicant's salary for the month of May, removed the Applicant from the 1<sup>st</sup> Respondent's payroll and has also taken away the Applicant's benefits provided in the Contract of Employment.
3. The Contemnor has further issued communication to the effect that the Applicant is no longer an employee of the 1<sup>st</sup> Respondent therefore prejudicing the Applicant's labour rights.

The application is supported by the Affidavit of Ezekiel Owuor, the Applicant, sworn on 31<sup>st</sup> May 2019. He avers that the Governance and Human Resource Committee of the respondent held a meeting on 15<sup>th</sup> May 2019 and resolved to hold on to the Applicant's salary. Further, the 2<sup>nd</sup> Respondent informed KCB Bank that the Applicant ceased to be the 1<sup>st</sup> Respondent's employee with effect from 1<sup>st</sup> May 2019 and directed the Bank to contact him for an alternative mortgage payment plan. He avers that the 2<sup>nd</sup> Respondent had knowledge of the Court

Order issued by the Court on 13<sup>th</sup> December 2018 but disobeyed the Order and that he interfered with the Applicant's employment in a manner contrary to the status quo in place, thus he is in contempt of the Court's express Orders.

In response to the Application, the 2<sup>nd</sup> Respondent (alleged Contemnor) filed a Replying Affidavit sworn on 17<sup>th</sup> June 2019. He avers that the Order issued on 13<sup>th</sup> December 2018 was extended on 18<sup>th</sup> December 2018 until 30<sup>th</sup> January 2019. Subsequently, the Applicant applied for extension of the Order until 1<sup>st</sup> March 2019, when the matter was scheduled for highlighting of submissions. However, the Court was not sitting on 1<sup>st</sup> March 2019 and the matter was scheduled for Mention on 26<sup>th</sup> March 2019. He avers that the Applicant's advocates did not attend Court on the set mention date, the 26<sup>th</sup> March 2019, and on the subsequent Mention on date 2<sup>nd</sup> May 2019 despite being served with a Mention Notice. It is his case that after 1<sup>st</sup> March 2019, there was no order maintaining the *status quo* or stopping the Respondents from taking further action against the Applicant.

He contends that the Applicant has failed to furnish any evidence showing the Respondents' specific breach of the Order and that the Applicant was enjoined to serve the Respondents with the Order and the Penal Notice, which in the instant case was not attached to the Order. He avers that there was no undertaking from the Respondents, in the Order, not to do any act they were restrained from doing. He urged the Court to dismiss the application with costs as it is unmerited.

### Submissions by the Parties

Counsel Wanjala for the Claimant submitted that the Order issued by this Court still subsists and binds all the parties as the matter was still pending at the *inter-partes* stage. He further submitted that the Respondents have no reason for disobeying the Order as they were served on 14<sup>th</sup> December 2018 and that the only explanation given was that there was no undertaking by the Respondents not to do any act they were restrained from doing. It was his submission that Court orders are to be obeyed unless there are orders to the contrary. In conclusion, he urged the Court to grant the prayers in the application and relied on their List of Authorities.

Counsel Ohaga for the Respondent submitted that a contempt application is quasi criminal whose standard of proof is above a balance of probability and just below that of any reasonable doubt. He submitted that the Applicant had not met the threshold to sustain an application of this nature. He submitted that the Court did not grant any of the prayers sought in the application and what the Claimant sought was to restrain disciplinary proceedings which he perceived were contemplated against him.

He submitted that the Court ordered that *status quo* be maintained and that no further action was to be taken against the Applicant pending the *inter-partes* hearing. He argued that 'no further action' as stated by Court referred to any disciplinary action for which the Claimant came to Court for relief. He therefore submitted that the Order cannot be contemplated in a vacuum and it must be in the context of the action pending before Court. As such, the Claimant had not been subjected to any disciplinary hearing. He further submitted that the 2<sup>nd</sup> Respondent is cited for contempt but he is not the Applicant's employer.

He submitted that the Applicant was expected to set out the nature of the benefits he perceived to have been withdrawn and that the court is not expected to isolate which of the benefits was pending. He therefore submitted that the Application falls short of the standards and threshold that is required for contempt of court. He relied on the Court of Appeal decision in ***Christine Wangari Gachege v Elizabeth Wanjiru Evans and 11 Others [2014] eKLR*** where it held that an application notice must set out the grounds on which committal application is made and that the application notice and affidavits must be served personally on the respondent unless the court dispenses with service. In this respect he submitted that the 2<sup>nd</sup> Respondent was never served with the application hence this application is incompetent.

In rebuttal, Counsel Wanjala submitted that the Notice of Motion sets out the prayers and grounds relied upon and that there was also evidence in support of the grounds set out. He further submitted that it is not for a party to construe an Order especially where the Court has explained the *status quo*.

In respect of service, he argued that as long as a party has appointed an advocate who has accepted service, service upon that advocate should suffice and relied on the case of ***Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR***. He further relied on the case of ***Evans Mumo Mwangangi v Kitui County Service Board & 4 Others [2016] eKLR*** and submitted that even parties to a suit can be held to be in contempt of an Order if they are aware of it.

### Determination

The Applicant contends that the 2<sup>nd</sup> Respondent was served with the Order issued on 13<sup>th</sup> December 2018. In his Replying Affidavit the 2<sup>nd</sup> Respondent avers that the Order issued on 13<sup>th</sup> December 2018 had lapsed and was never extended when the matter was scheduled for mention on 1<sup>st</sup> March 2019 and 26<sup>th</sup> March 2019 thus there was no Order maintaining the status quo from 1<sup>st</sup> March 2019. Certainly, from the record, the Court issued an Order to the effect that *status quo* be maintained meaning that no further action be taken against the applicant pending the *inter-partes* hearing of the application which was scheduled for 18<sup>th</sup> December 2018. Notably, the Order was extended on several occasions until 1<sup>st</sup> March 2019 when the Applicant's advocate failed to have the Interim Order extended. The orders of 19<sup>th</sup> February 2019 are explicit that the "*interim orders to remain in force until then*" that is until 1<sup>st</sup> March 2019. The applicant did not attend court on 26<sup>th</sup> March 2019 and 2<sup>nd</sup> May 2019 when the matter was scheduled for mention. As stated by the 2<sup>nd</sup> Respondent no Order subsisted after 1<sup>st</sup> March 2019. Thus in the absence of such Order there were no orders capable of being disobeyed after 1<sup>st</sup> March 2019.

The Court of Appeal decision in ***Woburn Estate Limited v Margaret Bashforth [2016] eKLR*** held that:

*"This Court in two recent successive decisions in Christine Wangari Wachege (supra) and Shimmers Plaza Limited (supra) explained in extenso the procedure in commencing and prosecuting an application for contempt of court under the English Civil*

*Procedure Rules, 1999. Part 81.9(1) of those rules, in particular, a judgment or an order to do or not to do an act may not be enforced unless the copy of the judgment or order was previously displayed and served; that the person required to do or not to do the act in question is warned that disobedience of the judgment or order would be a contempt of court, punishable by imprisonment, a fine or sequestration of assets, but the court can dispense with service. Otherwise a judgment or order may not be enforced unless a copy of it has been served on the person required to do or not to do the act in question.”*

In respect of service as rightly submitted by Counsel Ohaga the Applicant herein has not proved that the order was served upon the 2<sup>nd</sup> Respondent personally. Counsel Wanjala submitted that it was sufficient that the 2<sup>nd</sup> Respondent had appointed an advocate to act for it thus it was proper to have served the Advocates on record with the Order. This is however not the case as a contempt application seeks orders that curtail the liberty of the contemnor in *persona* thus he ought to be personally served with the Order.

In addition, in agreeing with Counsel Ohaga for the Respondent the Order issued on 13<sup>th</sup> December 2018 does not contain a penal notice attached to the Order thus the same order cannot be relied upon in citing the 2<sup>nd</sup> Respondent for contempt. Recently, the Court of Appeal in ***Kenya Reinsurance Corporation Ltd v Eunice Mbogo [2019] eKLR*** held:

*“The manner of displaying the penal notice is not described or defined. The submission, therefore, that the notice ought to have been contained on the face of order has no merit. What is important is that there was a penal notice accompanying the order.”*

Based on the foregoing I find that the applicant has not proved that there were orders in place on 1<sup>st</sup> and 15<sup>th</sup> May 2019 when the acts alleged to constitute the contempt are alleged to have been committed or that the alleged contemnors were served with the orders together with Penal Notice.

For these reasons the application fails and is accordingly dismissed. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**