



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**PETITION NO.10 OF 2016**

**GEOFFREY LOK PAPA ..... PETITIONER**

**VERSUS**

**REGISTRAR OF TRADE UNIONS.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL GENERAL SECRETARY KENYA BUILDING CONSTRUCTION,**

**TIMBER AND**

**FURNITURE EMPLOYEES UNION..... 2<sup>ND</sup> RESPONDENT**

**KENYA BUILDING CONSTRUCTION, TIMBER AND**

**FURNITURE EMPLOYEES UNION .....3<sup>RD</sup> RESPONDENT**

**THE PRSIDING OFFICER KENYA BUILDING**

**CONSTRUCTION, TIMBER AND FURNITURE**

**INDUSTRIES EMPLOYEES UNION NAKURU BRANCH .....4<sup>TH</sup> RESPONDENT**

**MAURICE S SHIUNDU ..... 5<sup>TH</sup> RESPONDENT**

**SILVANUS MANYONYI.....6<sup>TH</sup> RESPONDENT**

**MORRIS ATSANGO.....7<sup>TH</sup> RESPONDENT**

**DANIEL KAVITHA NDUNDA .....8<sup>TH</sup> RESPONDENT**

**ROSE AENDA AKUMBI.....9<sup>TH</sup> RESPONDENT**

**JOSEPH NJOROGE .....10<sup>TH</sup> RESPONDENT**

**RULING**

The petitioner Geoffrey Lok Papa by application and Notice of Motion dated 9<sup>th</sup> July, 2019 and brought under the provisions of Order 50 Rule 1 and section 5(1) of the Judicature Act are seeking for orders that;

(a) Spent.

(b) This court be pleased to grant leave to the applicants to commence contempt of court proceedings against the 2<sup>nd</sup> respondent (Francis Murage).

(c) This court be pleased to hold Francis Murage the National General Secretary of Kenya Building Construction, Timber and Furniture Employees Union in contempt of court and commit him to civil jail for a period of six (6) months or

as the court deems fit for disobeying court orders made on the 14<sup>th</sup> January, 2019.

(d) The costs of this application be borne by the 2<sup>nd</sup> respondent.

The application is supported by the petitioner's affidavit and on the grounds that the 2<sup>nd</sup> respondent has violated court orders herein and unless the court intervenes and stamp its authority on this contemnor he shall not cease from violating the orders of the court. It is only fair that the contemnor suffer commensurate punishment for his blatant and deliberate disobedience of the court orders. Such refusal to obey court orders issued on 14<sup>th</sup> February 2019 to call for fresh elections which were to be conducted within 60 days have been ignored.

In his affidavit, the petitioner avers that he filed the petition herein to challenge elections held on 24<sup>th</sup> January, 2016 and which petition was allowed on 14<sup>th</sup> February, 2019 and the 2<sup>nd</sup> respondent was directed as the general secretary to take over the branch affairs until fresh elections are conducted in 60 days. The 2<sup>nd</sup> respondent and office of the general secretary was directed to clean the member register as at 6<sup>th</sup> January, 2016 when the 1<sup>st</sup> respondent issued circular for elections and the members of the 3<sup>rd</sup> respondent to attend and verify the register and which was to close in 21 days.

The court order were served upon the 2<sup>nd</sup> respondent and who has since filed Notice of Appeal meaning he is aware of the court orders. There is however no stay of execution and hence the orders issued should have been obeyed. Q copy of the decree has been sent to the respondents and the 2<sup>nd</sup> respondent through the appointed advocate is in receipt of the same.

The 2<sup>nd</sup> respondent has failed to implement the court orders and decree and thus seek he be held in contempt of court and be jailed for 6 months.

To the application is an Affidavit of Service by Benjamin Radiga confirming service of court orders upon the 2<sup>nd</sup> respondent.

In reply, the respondent's filed Grounds of Opposition and Francis Murage filed Replying Affidavit and avers that he has read the petitioner's application and he is not named as a party in the above petition as the 2<sup>nd</sup> respondent is named as the National General Secretary Kenya building construction time and furniture employees Union. The 2<sup>nd</sup> respondent was never served with the decree and order issued by the court and as a person he was never served with a penal notice as required taking contempt of court proceedings.

Mr Murage also avers that the process server who allegedly served the decree does not state that he served a penal notice.

On 18<sup>th</sup> July, 2019 the respondents were given only a day to reply to the application by the petitioner. Under order 51 gives a respondent 7 clear days before the date of hearing. The right to a fair hearing are protected under article 50 of the constitution and by being directed to reply in a day was in breach of such provisions.

After the judgement the respondents filed Notice of Appeal on 26<sup>th</sup> February, 2019 and requested for typed proceedings. The respondent's then filed application in the Court of Appeal at Nairobi in Civil Appeal No.220 of 2019 on 7<sup>th</sup> July, 2019 but has not been heard.

The respondents are apprehensive that by the conduct of the court they will not get a fair hearing and have instructed their advocates to file application for recusal.

Mr Mugare also avers that he is a law abiding citizen aged over 70 years and the 2<sup>nd</sup> respondent is ready and willing to comply with the court orders if the court due process is exhumed.

Parties made oral submissions in court.

The claimant submitted that the 2<sup>nd</sup> respondent as the national general secretary of the 2<sup>nd</sup> respondent was served with the application herein on 12<sup>th</sup> July, 2019 the advocates served on 16<sup>th</sup> July, 2019.

The orders of the court on 14<sup>th</sup> February, 2019 were served upon the respondents on 1<sup>st</sup> March, 2019 and Affidavit of Service in this regard filed. The averments by Mr Francis Murage that he had not been named in the petition and that the 2<sup>nd</sup> respondent is not severed is not correct as he is the general secretary of the 2<sup>nd</sup> respondent and service upon him is proper. The fact that Mr Murage avers that there is an appeal filed confirms that he is aware of the court orders herein. The judgement of the court was read in the presence of the advocates for both parties and the 2<sup>nd</sup> respondent's general secretary cannot state he has never been served or aware of the orders issued on 14<sup>th</sup> February, 2019.

The 2<sup>nd</sup> respondent's advocate and who also attend for and on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that the application by the petitioner is seeking for leave to commence contempt proceedings against Mr Francis Murage who is not party to these proceedings. He is the national secretary of the 2<sup>nd</sup> respondent but was never named as a respondent in the suit. To be in contempt, the party must be sued as an individual and not as an officer. The decree served upon the 2<sup>nd</sup> respondent did not cite Mr Murage and therefore he cannot be held in contempt. No penal notice was served upon Mr Murage and the application before court is a non-starter and should be dismissed.

The respondents relied on the following cases – **Republic versus Principal Secretary, Ministry of Defence, ex parte George Kariuki Waitthaka [2018] eKLR; Chrispinus Ngayo Musundi versus the AG & another [2013] eKLR; Julius Morkong Chemtai versus Eliud Muringa Ngeywa & another [2013] eKLR; and Ramadhan Salim versus Evans Maabi t/a Murphy Auctioneers & another [2016]**

eKLR.

Contempt of court is a serious matter. Where proved, the court must stop and address as to proceed on the face of contempt would erode the dignity and authority of the court, impede compliance with court directions or observance and respect of due process and obstruct the administration of justice as administered by the court. The court is therefore given power to punish for any contempt of its orders.

The case of **K. G. Patel & Sons Ltd versus John Kabukuru Gituro [2016] eKLR** where the court held as follows;

*Every court of law is constituted for the purpose of administering justice between the parties and, therefore, must be deemed to possess, as a necessary corollary, all such powers as may be necessary to do the right and undo the wrong in the course of administration of justice. Inherent powers of the court are complementary to those powers and the court is free to exercise them for the ends of justice or to prevent the abuse of the process of the court. The reason is obvious. Legislature is incapable of contemplating all the possible eventualities which may arise in future litigation. Inherent powers come to the rescue in such unforeseen circumstances. They can be exercised ex debito justitiae (as a matter of course) in the absence of express provisions in the Code.*

This is given emphasis in the case of **Econet Wireless Ltd versus Minister for Information & Communication of Kenya & Another [2005] eKLR**;

*Where an application for committal for contempt of court orders is made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious- a contemnor would have no right of audience in any court of law unless he is punished or purges the contempt.*

It is not in dispute that Mr Murage was personally served. His view is that he was not a party to these proceedings and that he was not issued with a penal notice. see **Teachers Service Commission versus Kenya National Union of Teachers & 2 others [2013] eKLR** and the case of **Kenya Tea Growers Association versus Francis Atwoli and 5 Others [2012] eKLR** and **Basil Criticos versus Attorney General and 8 Others [2012] eKLR** that :

***“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary”***

The gist of the application herein is that the 2<sup>nd</sup> respondent has been made aware of the court judgement, the orders therefrom and the decree but has refused to obey. The orders and decree were extracted, served but the 2<sup>nd</sup> respondent through the general secretary and being Mr Murage has failed and or ignored to comply as directed.

The 2<sup>nd</sup> respondent and in essence Mr Murage in reply avers that he was not a party to the suit, he is not named, cited or served with the court orders or the decree and where such was done, there was no penal notice and further there is a Notice of Appeal and application filed with the Court of Appeal following judgement herein.

On 14<sup>th</sup> February, 2019 the court delivered judgement in the presence of the parties herein and directed under orders (a), (b) and (c) of the judgement as follows;

***(a) The elections for various positions held on 24<sup>th</sup> January, 2016 for the Nakuru branch, Kenya Building Constitution, Timber and Furniture Industries Employees Union is hereby declared null and void;***

***(b) The 2<sup>nd</sup> respondent and office of General Secretary shall take over the affairs of the branch until fresh elections are conducted in the next 60 (sixty) days;***

***(c) The 2<sup>nd</sup> respondent and office of General Secretary shall clean the member register applicable as at 6<sup>th</sup> January, 2016 when the 1<sup>st</sup> respondent issued circular for elections and this shall be done within 14 days;***

The tenor of the judgement was that the 2<sup>nd</sup> respondent elections for Nakuru Branch be held afresh. The 2<sup>nd</sup> respondent and office of general secretary being Mr Murage and who had opposed the petition by filing his Replying Affidavit as the General Secretary of the 2<sup>nd</sup> respondent as noted under paragraph 56 of the judgement delivered on 14<sup>th</sup> February, 2019 was thus directed to take over the affairs of the branch and ensure elections were held in 60 days.

Such clarity, orders and directions by the court are not challenged. The 2<sup>nd</sup> respondent is an office held by the person or Mr Murage and who is well defined under *Rule 10* and *Rule 11* of the union constitution and the duties of such office defined under *Rule 12 (a), (d)* as the overall responsible person/officer of the union. Such defined role and responsibilities are commensurate with the provisions of section 2 of the Labour Relations Act, 2007 (the Act) which defines who the authorised officer of a trade union is and provides that;

*In this Act, unless the context otherwise requires*

***“Authorised representative” means—***

**(a) The general secretary of a trade union;**

...

*“general-secretary” means the national secretary of a registered trade union;*

Such Authorised officer and office of general secretary of a trade union is given great prominence under the Act on the functions, duties and responsibilities. Under such mandate, the court in its judgement thus directed the 2<sup>nd</sup> respondent and the office holder to take charge of the affairs of the 3<sup>rd</sup> respondent and undertake affairs of 4<sup>th</sup> respondent for holding of fresh elections.

To thus aver that Mr Murage as the current general secretary and holder of the office of 2<sup>nd</sup> respondent is not a party herein and has not been enjoined is simply being dishonest. Mr Murage cannot be the holder of office for the 2<sup>nd</sup> respondent for convenience. He attended herein as the 2<sup>nd</sup> respondent as confirmed by his Replying Affidavit in response to the petition and has enjoyed legal representation and his advocates actively participated in the proceedings and were present when the court rendered judgement on 14<sup>th</sup> February, 2019. See the court record.

I therefore find Mr Murage, holder of office as National General Secretary of the 3<sup>rd</sup> respondent and named in the petition as the 2<sup>nd</sup> respondent knowingly and wilfully disobeyed the orders of this Court issued on 14<sup>th</sup> February, 2019 and is hereby cited for contempt of court.

Wilful disobedience of court orders should be punished.

Before a sanction can issue as the petitioner has applied, the court noting the orders and directions in the judgement issued on 14<sup>th</sup> February, 2019 to remove the person of Mr Murage as the officer holder and 2<sup>nd</sup> respondent will derail the orders of the court. It is imperative that the actions of contempt by the 2<sup>nd</sup> respondent and person of Mr Murage do not impede the course of justice as such intention herein is apparent.

The court therefore will keep the 2<sup>nd</sup> respondent and office holder Mr Murage in office to undertake as directed on 14<sup>th</sup> February, 2019. For this purpose time to comply is extended by 14 days only. The court shall follow and ensure strict compliance on the face of contempt. Where there is no adherence, a sanction shall issue.

**Accordingly,**

- 1) the court finds Mr Francis Murage in contempt of court vide orders issued on 14<sup>th</sup> February, 2019;**
- 2) Before sanction is issued time is hereby extended by fourteen days (14) for compliance as directed on 14<sup>th</sup> February, 2019;**
- 3) For avoidance of doubt the 2<sup>nd</sup> respondent and office holder is Mr Francis Murage who shall attend as above and personally return to court for his report on compliance on the 7<sup>th</sup> October, 2019; and**
- 4) The 2<sup>nd</sup> respondent shall meet the costs of the application due to the petitioner.**

Orders accordingly.

Delivered at Nakuru this 23<sup>rd</sup> day of September, 2019

**M. MBARU**

**JUDGE**

In the presence of: .....

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