



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1562 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 17th September, 2019)

JENIPHER ACHIENG' OUKO & 13 OTHERS.....CLAIMANTS/APPLICANTS

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

RULING

1. The Claimants/Applicants, Jenipher Achieng' Ouko and 13 Others filed a Notice of Motion Application dated 31/01/2019 brought under Section 12 and 16 of the Employment & Labour Relations Court Act, Section 5 of the Judicature Act and all other enabling provisions of the law against the Respondent, University of Nairobi.

2. They seek to be heard for Orders that:-

1. The Application filed herein be and is hereby certified as urgent, service be dispensed with in the first instance and the same be heard exparte in the first instance.

2. This Honourable Court be pleased to grant leave to the Claimants/Applicants to initiate contempt of court proceedings against the Respondent's Vice Chancellor Prof. Peter Mbithi and the Chief Personnel Officer Peter M. Mbuthia.

3. The said Prof. Peter Mbithi and the Chief Personnel Officer Peter M. Mbuthia be summoned before this Honourable Court to show cause why they should not be committed to six (6) months civil jail or such other period the Court may deem fit and just to grant.

4. This Honourable Court do cite and commit to prison Prof. Peter Mbithi and Peter M. Mbuthia for a period of six (6) months or such other period the Honourable Court may deem fit to impose in the circumstances.

5. The Claimants be and are hereby reinstated to their previous employment without any loss of benefits and continuity of service, back salaries and allowances and benefits.

6. This Honourable Court do issue such orders and directions as it may consider fit and just.

7. The Cost of this Application be borne by the Respondent.

3. The Application is based on the grounds that the Hon. Abuodha J issued interim orders on 04/08/2017 to the effect that the then intended outsourcing of services offered by the Claimants/Applicants in cleaning and grounds maintenance would stop and that further, the Respondent whether through its agents/officers are restrained from initiating disciplinary proceedings, transferring, terminating, suspending them on account of initiating this suit until 21/09/2017.

4. That on 27/11/2017, this Honourable Court confirmed the said Orders were to last until hearing of the main suit with parties being directed to fix the hearing date at the registry. That the said orders are still in force and have never been varied or set aside and that the orders have always been extended and confirmed in the presence of the Respondent's advocates.

5. That the Respondent has with impunity and disregard to the said orders refused, ignored and/or declined without any reasonable cause to comply with the said orders and proceeded to terminate the Claimants/Applicants' employment. That these actions amount to contempt of the Court orders and directives and that unless the orders sought herein are granted, the Claimants/Applicants will continue to suffer irreparable loss and damage.

6. That this Court has jurisdiction to enforce its orders save for which administration of justice will be severely compromised and that the Respondent will not suffer any prejudice should this court award the orders sought herein. That it is therefore in the interest of justice that the Claimants/Applicants' is allowed.

7. The Application is supported by the Affidavit of the 1st Claimant, Jenipher Achieng' Ouko on behalf of the other co-claimants who avers that on 21/09/2017, the said interim orders were extended by this Honourable Court and issued on 16/10/2017. That the same was served on the Respondent's advocates on 19/10/2017 and on 06/11/2017, the Respondent's counsel attended court and sought time extension to file its papers and that the interim orders were extended to 27/11/2017.

8. That in effect, their application dated 13/07/2016 was successful as the Respondent partially complied with the Court's orders as directed no outsourcing was done and none of the Claimants was victimized. That however on 02/01/2019, the Respondent's officers orally and without prior notice dismissed all the Claimants from their services in contravention of this Court's directives and the Employment Act.

9. That she is aware the suit has not yet been heard and/or determined in finality as directed and that disobedience of court orders is a serious offence which must be punished so as to uphold the authority and dignity of the Court. She annexes documents marked **JA01, JA02** and **JA03** in support of the Application.

Respondent's Case

10. The Respondent filed its Grounds of Opposition dated 27/02/2019 pursuant to *sections 12 and 13 of the Employment & Labour Relations Court Act* and prays that the Application dated 31/01/2019 is dismissed with costs to it. It opposes this Application on the grounds that:-

1. The alleged orders issued by the Court expired on 06/11/2017.

2. The application is fatally defective.

3. The Respondents have not been served with the orders.

4. The application is frivolous, vexatious and lacks merit and ought to be dismissed.

5. The Applicants are not keen to finalise the main suit but rather engage in sideshows and thus subvert the judicial process.

6. The suit and application are for dismissal for being in abuse of the court process.

7. The application lacks legal or factual basis.

Claimants/Applicants' Submissions

11. The Applicants submit that the **Black's Law Dictionary (Ninth Edition)** defines contempt of court as "*Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.*" That without power to punish for contempt, this Honourable Court would cease to stand as a constitutional authority and that this power enables the Court to regulate its internal conduct and safeguard against contemnors or disruptive intrusions.

12. That the Respondent contemnor going against this Court's orders challenges the supremacy of the Constitution and **Article 10 of the 2010 Constitution** on the values and principles of governance. That judicial authority is an expression of the sovereign power of the people pursuant to **Article 159(1) of the Constitution** and that this Court has fundamental obligation drawn from **Article 162(2) of the Constitution** to enforce its orders and punish the Respondent contemnors.

13. It is submitted by the Applicants that they have effectively and on a balance of probabilities demonstrated that the Respondent is in contempt of this Honourable Court's orders and should thus be punished. That they have also indicated without any doubt that without this Court exercising its inherent jurisdiction to hold and punish the Respondent for contempt, then the dignity of this Court shall continue being in disrepute.

14. That had the Respondent and/or its agents, officers and/or servants acted in full regard of this Court's several orders, this contempt application would not have been filed and parties would be preparing for hearing and determination of this suit within the shortest time available. That costs follow event and so the Respondent's actions can only be remedied by slapping them with costs of this application.

Respondent's Submissions

15. The Respondent submits that the reliefs sought cannot be granted against it because there was no valid order with a penal notice served on it/ the alleged contemnors as required by law and that there was no penal notice prominently displayed on the order warning of the consequences of disobedience.

16. Further, the Applicants have not proved any malicious refusal to comply on its part and that the order for their Reinstatement has no legal or factual basis or foundation in the absence of this prayer in the substantive suit. That the prayer for reinstatement is thus an afterthought and which can only be granted during the hearing and determination of the main suit.

17. It submits that when the matter was scheduled for hearing for 18/06/2018 this Honourable Court did not sit, the orders lapsed naturally as they were not extended by any court of law. That when the matter came up next on 19/02/2019, the Applicants' counsel did not inform the Court whether he required fresh orders to revive the former ones or an extension of the lapsed orders. That this implied that parties were satisfied with the existing state of affairs and so the interim orders had already lapsed on 18/06/2018 and ceased to be valid for any meaningful enforcement.

18. That in Civil Case No. 106 of 2009, Solomon Kinoti & Another –v- Attorney General [2011] eKLR where Justice Karanja held that the interim orders had since lapsed on the basis that they were not extended as required on 29th July 2009 when the hearing of the first preliminary objection commenced and adjourned to 28th, 29th and 30th September 2009. That because the plaintiffs did not move the court for the extension of the interim orders, the orders became stale and expired.

19. Further, that in Eliakim Washington Olweny –v- Wilson Kibor Mutai & Another [2013] eKLR, the court held that the provisions of Order 40 Rule 6 provide that where an interlocutory injunction granted in a suit is not determined within twelve months from the date of the grant, the injunction shall lapse unless the Court orders otherwise for any sufficient reason. The Court also observed that the Respondent was the one to provide reasons as to why the injunction should continue.

20. The Respondent also relies on Civil Appeal No. 95/1988 Mwangi H.C Wang'ondu –v- Nairobi City Commission (UR) where the Court of Appeal confirmed the mandatory nature of the requirement of endorsement of notice of penal consequence on the order. That in Civil Case 69 of 2003, Sam Nyamweya & 3 Others –v- Kenya Premier League Limited & 2 others [2015] eKLR, R.E. Aburili J in dismissing the contempt application, held that:-

“...it is trite clear that there must be a penal notice prominently displayed on the order, warning of the consequence of disobedience. In the instant case, the order...has no penal Notice. The rules mandate such penal notice being conspicuously displayed unless there is an undertaking by the Respondent not to do the act which he is restrained from doing.”

21. The Respondent submits that two principles of liberty and coherence emerge from orders for committal for contempt and that it is trite law that the alleged contemnor must be personally served with the Court Order they are alleged in contempt of. It cites Civil Appeal 56 of 2003, Isaac Karuri Nyongo & another –v- Ruiru Sports Club [2005] eKLR where H. M Okwengu J held that the application must fail as there was no evidence that the order alleged to have been served was properly endorsed with a notice of penal consequences; the order was ambiguous for not being directed to any specific person; and that there was no evidence that one Timmis had committed any act or omissions in disobedience to the court order.

22. The Respondent in this instant application submits that the Applicants have failed to prove its alleged breach of court orders as provided for in **Section 107-110 of the Evidence Act** requiring that whoever alleges must be prove. It cites the case of Republic v Kenyatta University Exparte Losem Naomi Chepkemoi [2019] eKLR and also relies on Petition 87 of 2012, Kenya Data Network –v- Kenya Revenue Authority [2013] eKLR where Mumbi Ngugi J held that an applicant who seeks to commit a person for breach of an injunction must establish a deliberate or wilful breach of a court order beyond reasonable doubt.

23. On the issue of Reinstatement, the Respondent cites the case of Ekua Lomongin –v- Julia A. Ojiambo & another [2018] eKLR where the court reiterated that prayers in an application must be hinged on the main prayers of a substantive suit, failure of which renders such application defective and incompetent, as it would have no leg to stand on.

24. They further submit that the Applicants need to schedule the main suit for hearing instead of engaging in ongoing litigation that does not address the main issues substantively. That there are essentially four elements that ought to be proved to make a case for civil contempt and which include:-

i. The terms of the order were clear and unambiguous and were binding on the Respondent;

ii. The Respondent had knowledge of or proper notice of the terms of the order;

iii. The Respondent had acted in breach of the terms of the order; and

iv. The Respondent's conduct was deliberate.

25. The Respondents finally submits that the application is calculated to discredit the credibility of its mandate and function while ultimately eroding the public's confidence in the institution. It prays that this Court finds that the application is neither merited nor maintainable and that it be dismissed with costs and interests thereon.

26. I have examined the averments of the Parties herein. There is no denial that this Court issued orders on 4/8/2017 restraining the Respondents herein from outsourcing of services offered by the Claimant/Applicants herein. These orders were extended from time to time and on 27/11/2017, the Parties by consent agreed to have the interim orders stayed and the Parties to proceed with the main claim.

27. The interim orders were to remain in force until hearing of the claim. There is no indication that these orders were ever varied or stayed. It is therefore not true as contended by the Respondents that these orders lapsed on 6/11/2017.

28. The orders of 27/11/2019 were made in the presence of the Counsels on record for the Respondent and Claimants.

29. In the current applications 2 officials of the Respondent Prof. Peter Mbithi Vice Chancellor and the Chief Personnel Officer, Mr. Peter M.

Mbuthia have been singled out to be cited for contempt.

30. The Respondent have however indicated that the orders in question were never served with a penal notice upon the alleged contemnors as required by law. The Respondent cited **Civil Appeal No. 56 of 2003, Isaac Karuri Nyongo and another vs Ruiru Sports Club (2005) eKLR** where H. M. Okwengu J (as she then was) held that the application must fail as there was no evidence that the orders were served upon the contemnors personally.

31. In the current case, the 2 alleged contemnors cited are the Vice Chancellor and Personnel Officer. It has however not been demonstrated before this Court that the 2 alleged contemnors were personally served with the orders of this Court. It is also not demonstrated what the 2 did or omitted to do in contempt of this Court's orders.

32. In the circumstances, I find the Application for contempt against the alleged contemnors cannot stand and the same is dismissed accordingly.

33. Costs in the cause.

Dated and delivered in open Court this 17th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kinyua holding brief Nyabena for Claimants – Present

Mbeche holding brief Kipkorir – Present