



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**JUDICIAL REVIEW NO. 18 OF 2017**  
**(Formerly JR. NO. 487 OF 2017)**

(Before Hon. Justice Hellen S. Wasilwa on 20<sup>th</sup> March, 2018)

REPUBLIC ..... APPLICANT

VERSUS

THE DIRECTORS OF IMMIGRATION SERVICES .....1<sup>ST</sup> RESPONDENT

MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT..... 2<sup>ND</sup> RESPONDENT

THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT

RADOVAN BOCA ..... 4<sup>TH</sup> RESPONDENT

EX-PARTE: KENYA ASSOCIATION OF PLASTIC AND RECONSTRUCTIVE

SURGEONS through its Claimant Prof STANLEY OMINDE KAHINGA

**RULING**

1. The Application before the Court is by the Ex parte Applicant dated 27.10.2017 brought under section 8 of the Contempt of Court Act No. 46 of 2016 and all other enabling provisions of the law seeking orders:

*1. That this Honourable Court be pleased and the application be certified urgent and the same be heard ex parte in the first instant.*

*2. That this Honourable Court be pleased to find the 4<sup>th</sup> Respondent RADOVAN BOCA In contempt of the order of Honourable Lady Justice Monica Mbaru issued on 31.8.2017.*

*3. That the said 4<sup>th</sup> Respondent RADOVAN BOCA be committed to Civil jail for a term not exceeding six (6) months.*

**4. That this Honourable Court be pleased to order that the 4<sup>th</sup> Respondent RADOVAN BOCA should not be heard by the Court until he purges the contempt.**

**5. That this Honorable Court be pleased to issue such other or further punitive Orders in respect of the said contempt as may be necessary for the ends of justice to be met.**

**6. That the costs of and occasioned by this application be costs in the cause.**

2. The Application is premised on the grounds:

**a. That the Applicant moved this honorable Court on 31.8.2017 vide an application dated 3.8.2017, seeking leave to apply to the court for orders of prohibition and Certiorari against the Respondents and the same to operate as stay pending the hearing and determination of the substantive application.**

**b. That the orders sought by the Applicant were granted and the same were to operate as stay pending the hearing and determination of the substantive suit.**

**c. That subsequently the Applicant filed a substantive motion on 31.8.2017.**

**d. That the Applicant also served the notice of motion and the extracted order upon the Respondents.**

**e. That the 4<sup>th</sup> Respondent continues to work and perform his duties as a plastic and reconstructive surgeon at Aga Khan University Hospital despite his knowledge and awareness of the Orders of the Honourable Court.**

**f. That the 4<sup>th</sup> Respondent RADOVAN BOCA has violated the Court orders to date and is therefore in contempt of the Court.**

**g. That unless the Honourable Court cites the 4<sup>th</sup> Respondent RADOVAN BOCA for contempt of the orders of this Court, the authority and dignity of this Honorable Court remains at stake.**

**h. That it is essential for the maintenance of the rule of law and good order that the authority and dignity of our Courts is upheld at all times.**

**i. That unless the 4<sup>th</sup> Respondent RADOVAN BOCA is punished for disobeying the Order of the Court, the Court shall suffer ridicule and its orders shall be disobeyed further for lack of action on its part to stamp authority.**

**j. That the image of the Court at large and the Applicant shall suffer great loss and injustice if the Orders sought are not granted.**

3. The Application is supported by the Affidavit of Professor Stanley Ominde Khainga where he reiterates the grounds on the face of the Application.

4. The Respondents have opposed the Application and the 1<sup>st</sup> to 3<sup>rd</sup> Applicants have filed a Replying Affidavit through one Jimmy Mukuli wherein he states that as per the Orders of 9.8.2017 there was no order prohibiting the 4<sup>th</sup> Respondent from continuing to work and practice medicine as a plastic and reconstructive surgeon. Further the Orders of the Court were issued on the understanding that the 4<sup>th</sup> Respondent was yet to be issued with a work permit which position was not correct.

5. He contends that the Aga Khan University Hospital had applied on behalf of the 4<sup>th</sup> Respondent to be issued with work permit way back on 18.3.2015, which was consequently approved on 25<sup>th</sup> June, 2014

and was later renewed on application on 26.7.2017 making the orders of the Court overtaken by events.

6. That this matter came up for hearing of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Preliminary Objection on 31.10.2017 when the Applicant's Advocated served the state counsel with the contempt application contrary to section 30(3) of the Contempt of Court Act that requires persons likely to suffer any penalty be served in person.

7. It is also contended that the Orders of 9.8.2017, lapsed, and that the preliminary Objection to the main application by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ought to be heard first before the main application. The Respondents therefore seek for the Application to be dismissed for abuse of Court process.

8. The 4<sup>th</sup> Respondent has filed a preliminary objection in opposition to the instant application wherein he states that that this Court lacks jurisdiction to entertain the matter as the Applicant failed to seek and obtain the consent of the Director of Public Prosecutions and/or leave of this Honourable Court as required by section 8 of the Contempt of Court Act, 2016. Further that in any event the acts complained of do not constitute criminal contempt to entitle the Applicant to move this Honorable Court under section 8 of the Contempt of Court Act, 2016.

### **Submissions**

9. The Applicants submit that the 4<sup>th</sup> Respondent was served with the Court order which he does not deny and whether it is was ambiguous or unclear is a question that has not been determined by the Honourable Court and no application whatsoever has been placed before the Court for determinations by the Respondents or a question for interpretation raised varying or discharging the orders. That it is therefore clear that the Respondents were all aware of the Orders and chose to willfully disobey and have no justification why they should not be held in contempt. They cite the case of **B vs Attorney General (2004) 1KLR 431** where it was held that Court Orders are not made in vain.

10. It is also submitted that the Respondents had knowledge of the Court orders and thus the issue of personal service does not arise. The cite the case of **Republic Vs The Kenya School of Law & Another Miscellaneous Application No. 58 of 2014** to buttress this position.

11. It is further submitted that the orders of the Court were issued on 9.8.2017 and the substantive motion filed on 31.8.2017 which was within time and as such the Application is properly before the Court and pray for the Application to be allowed.

12. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents submit that the order of the Court of 31.8.2017 was to the effect that the 4<sup>th</sup> Respondent to not be issued with a work permit as he did not qualify the requirements and there were Kenyans qualified to work as such. That the Applicant failed to disclose to the Court that the 4<sup>th</sup> Respondent had already been issued with a work permit two years before and had renewed the same a few months before the applicant made the instant application.

13. Further that the orders did not prohibit the 4<sup>th</sup> Respondent from performing his duties as a plastic surgeon at his place of employment and his employer has not been enjoined in these proceedings. The Respondents also contend that the orders of the court have been overtaken by events, as there is no contempt as stated by the Court on 31.10.2017. As such, they pray for the Application to be disallowed.

14. The 4<sup>th</sup> Respondent submits that the Application before the Court is incompetent as the Applicant cites section 8 of the Contempt of Court Act, 2016, and seeks substantive prayers which prayers are not available under the said section 8. That the grounds relied on ought to be proved by particulars duly supported by evidence. They cite the case of **Margret Ogweni Okoth V Gabriel Onyango Wade HCCC No. 44 of 2003** where it was held that it is the responsibility of the person seeking an order for contempt to show that there has been willful disobedience of the Court order which was properly served.

15. It is also submitted that the application lacks merit for the reason that the orders in question do not

restrain the 4<sup>th</sup> Respondent in any way nor do they require him to do anything as clarified by Ndolo J and confirmed by Mbaru J. Counsel for the 4<sup>th</sup> Respondent therefore prays for the Application to be dismissed with costs.

16. I have considered the averments and submissions of both parties. In determining whether the Respondent contemnor is guilty of contempt or not, the issues for determination are as follows:-

**1. Whether the contemnor was aware of the Court orders issued by Hon. Judge Mbaru on 31.8.2017.**

**2. Whether the alleged contemnor Radovan Boca committed any act or omission in contravention to the Court orders of 31.8.2017.**

17. On 31.8.2017, the Applicant herein approved this Court under Certificate of Urgency and Notice of Motion dated 28/8/2017 seeking orders as follows:-

**1. That an order of order of PROHIBITION prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from issuing a work permit to the 4<sup>th</sup> Respondent herein a foreign national who is a plastic surgeon as persons with his qualifications are available in Kenya.**

**2. That an order of orders of certiorari to bring to this Court and quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to issue to a work permit to the 4<sup>th</sup> Respondent who does not meet the requirements to be issued with a work permit in Kenya.**

**3. That the Honourable Court be pleased to make further such orders as it may deem fit and just.**

**4. That cost of the Application be provided for.**

18. The grounds in support of the orders sought were explained on the face of the application. The Application was also supported by the affidavit of one Prof Stanley Ominde Khainga the chairman of the Ex-parte Applicant herein.

19. Upon hearing the exparte Applicant, the Hon. Judge Mbaru gave the following orders:-

**5. That leave be and is hereby granted to the ex-parte Applicant to apply for an order of PROHIBITION prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from issuing a work permit to the 4<sup>th</sup> Respondent herein a foreign national who is a plastic surgeon as persons with his qualifications are available in Kenya.**

**6. That leave be and is hereby granted to the Applicant to apply for orders or prohibition to operate as stay of any intended, issued and pending issuance of a work permit by the 1<sup>st</sup> Respondent who is of the 2<sup>nd</sup> Respondent does not meet the requirements to be issued with a work permit in Kenya pending the hearing and determination of the substantive application to be filed herein.**

**7. That leave be and is hereby granted to the ex-parte Applicant to apply for orders of certiorari to bring to this Court and quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to issue to a work permit to the 4<sup>th</sup> Respondent who does not meet the requirements to be issued with a work permit in Kenya.**

**8. That the Applicant is given 21 days leave and such leave shall apply as stay in terms of orders (2) (3) & (4).**

20. My understanding of this orders are that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent herein were henceforth prohibited from issuing the 4<sup>th</sup> Respondent herein with a work permit from that date 31/8/2017 and if the work permit had bene issued, the orders granted allowed the Applicants to bring to Court and seek orders to quash the issuance.

21. The Application and orders of 31/8/2017 were served upon the 4<sup>th</sup> Respondent herein and this is affirmed by the 4<sup>th</sup> Respondent in his replying affidavit filed in Court on 13.12.2017. In the affidavit at paragraph 6 the 4<sup>th</sup> Respondent avers that he was served with the order of the Court on 4.9.2017. Thus on whether the 4<sup>th</sup> Respondent was aware of the Court order this Court finds in the affirmative.

22. The next issue is whether the 4<sup>th</sup> Respondent did any act or omitted to do any act in contravention of the orders of 31.8.2017.

23. The orders of 31.8.2017 in my view were directed at 1<sup>st</sup> and 2<sup>nd</sup> Respondents. They were directed not to issue work permits to the 4<sup>th</sup> Respondent.

24. By this date, the 4<sup>th</sup> Respondent had been issued with a work permit prior to this date, the last one being one issued on 26/7/2017. It is therefore apparent that on 31/8/2017 when the orders of Hon. Judge Mbaru were issued prohibiting issuance of a work permit, to the 4<sup>th</sup> Respondent, the same had already been issued (Appendix JN1). Thus the fact that the 4<sup>th</sup> Respondent had a work permit already issued to him connotes that he had not done anything after 31/8/2017 in total disregard of the orders of 31.8.2017.

25. Other order issued by Judge Mbaru was to grant leave to the Applicant to bring an application to seek to quash any such work permit that had previously been given. I believe the application is still pending before this Court.

26. It is therefore my finding that the 4<sup>th</sup> Respondent has not done any act or omission to award himself a work permit after 31/8/2017. In any case if there has been any orders contrary to the order of 31/8/2017, these have not been committed by the 4<sup>th</sup> Respondent. I therefore find that this application has no merit and I therefore dismiss it accordingly.

27. Costs in the cause.

**Dated and delivered in open Court this 20<sup>th</sup> day of March, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kioko holding brief for Shitubi for Respondents – Present

Darr holding brief for Kamotho for the 4<sup>th</sup> Respondent – Present

Mwangi holding brief for Nyangito for Applicant – Present