



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO 137 OF 2016

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF
THE RIGHTS AND FREEDOMS IN ARTICLES 2, 3, 10, 19(1) & 2, 20(1) &
(2), 21(1), 22(1), 23, 25 (C), 27(1), (2), (3), & (5), 28, 29(A), (C), (D) & (F),
30, 33(1)(A), 35(1)(B), 41(1)(2)(B), 47(1) & (2), 48, 50(1) & (2)(D) & (E),
73, 75, 258(1) & 259(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE
EMPLOYMENT ACT SECTIONS 5, 6, 9, 10, 28, & 40**

AND

**IN THE MATTER OF ALLEGED VIOLATION OF THE
EAPCC HUMAN RESOURCES POLICY MANUAL, 2012**

AND

**IN THE MATTER OF THE EMPLOYMENT AND
LABOUR RELATIONS COURT ACT, SECTION 12**

BETWEEN

LUCY RIMANTO MOLONKET.....PETITIONER/APPLICANT

VS

SIMON PETER OLE NKERI.....1ST RESPONDENT

WILLIAM LAY.....2ND RESPONDENT

KUNGU GATABAKI.....3RD RESPONDENT

JACKSON KINYANJUI.....TH RESPONDENT

DR. ANTHONY OMIRIKWA.....5TH RESPONDENT

PROF. SARONE OLE SENA.....6TH RESPONDENT
EAST AFRICAN PORTLAND CEMENT
COMPANY LIMITED.....7TH RESPONDENT
CABINET SECRETARY, MINISTRY OF
INDUSTRY, TRADE AND CO-OPERATIVES.....8THRESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....1STINTERESTED PARTY
DIRECTOR, CRIMINAL
INVESTIGATION DEPARTMENT.....2ND INTERESTED PARTY

RULING

Introduction

1. *“Upon hearing Counsel for the Petitioner/ Applicant I certify the matter urgent. I also grant a temporary order staying the decision of the 7th Respondent as communicated by the 1st Respondent by letter dated 30th September 2016 pending inter partes hearing of this application on 23rd November 2016.”*

2. These are the exact words of my order granted on 11th November 2016, which is the subject of the Petitioner’s Notice of Motion in the nature of contempt of court application dated 7th December 2016.

3. The letter dated 30th September 2016 itself stated as follows:

“Dear Lucy,

RE: APPOINTMENT

*Following a decision of the Board of Directors at a meeting held on 30th September 2016, we are pleased to advise you that you have been appointed as the **Head of Special Projects** with immediate effect.*

Your new role shall entail, but not limited to, the following duties and responsibilities:-

- *Distribution Mechanisms*
- *Market Intelligence*
- *Cost Cutting Initiatives*
- *Relationship Management*

Your other terms and conditions of service shall remain as currently stated and/or as previously communicated to you save for the terms that are aligned to the new position.

As we congratulate you for the new role in the company, we wish to reiterate the desire and intention to turnaround the fortunes of the company. A transformative commitment, dedication and focus is expected from you with the aim of serving the interests of the company, customers, colleagues and communities that work closely with the company while ensuring that we take control of the business so as to create value for the shareholders and other stakeholders.

Yours faithfully

(Signed)

Simon Peter Ole Nkeri

MANAGING DIRECTOR”

4. The Petitioner subsequently came back to court alleging that the order of 11th November 2016 had not been complied with. By her application dated 7th December 2016 the Petitioner asks the Court to find that the 1st to 6th Respondents are in contempt of court.

5. The Petitioner further asks the Court to impose a fine of Kshs. 10,000,000 against the alleged contemnors and in default an order attaching all their movable assets, including land and buildings. Additionally, the Petitioner asks that the alleged contemnors be committed to civil jail for a period of six (6) months for contempt of court.

6. The application, which is supported by the Petitioner's own affidavit is based on the following grounds:

a) On 11th November 2016, the Court granted orders staying the decision of the 7th Respondent communicated by letter to the Petitioner vide letter dated 30th September 2016 by the 1st Respondent, purporting to appoint the Petitioner to the non-existent position of Head of Special Projects. The order was duly served on the 1st to 7th Respondents on 12th November 2016;

b) In blatant breach of the court order, the 1st to 6th Respondents refused, neglected, failed and/or ignored to reinstate the Petitioner prompting the Respondent's Counsel to write letter dated 16th November 2016 demanding her immediate reinstatement;

c) By letter dated 21st November 2016 to the Petitioner, the 1st Respondent indicated that the Board of Directors, at a meeting held on the same day, had resolved to comply with the court order issued on 11th November 2016. The Petitioner states that it is curious and even contemptuous that a Board of Directors (the 1st to 6th Respondents) had to decide and resolve whether to obey a court order or not;

d) The Petitioner was ceremoniously "reinstated" through the same letter but allegedly pending further orders of the court. The Petitioner takes the view that the alleged reinstatement was not done in good faith as it anticipated an unfavourable court action/decision against the Petitioner;

e) Having been tied by the court order, the 1st Respondent had resorted to unwarranted harassment and frustration of the Petitioner including:

i) Retention of one Abraham Kiprotich as the Acting Head of Sales & Marketing;

ii) Occupation of the office of the Head of Sales and Marketing by the said Abraham Kiprotich;

iii) Exclusion of the Petitioner from retreats and dinners for members of the Sales and Marketing team;

iv) Threats and intimidation by the 1st Respondent against anyone associating with the Petitioner;

v) Attempts by the 1st Respondent to recover the sum of Kshs. 1,210,000 spent by the 7th Respondent on account of the Petitioner's tooth surgery, which had been duly approved by the company through its Head of Human Resource & Administration;

vi) Instructions by the 1st Respondent contained in internal memo dated 22nd November 2016 asking the Petitioner to develop a Sales and Marketing Business Plan for the financial year 2017/2018, while denying her office space to work from;

vii) Memo dated 30th November 2016 issued by the Head of HR & Administration under the 1st Respondent's instruction, advising the Petitioner to take compulsory leave during the months of December 2016 and January 2017;

viii) The 1st Respondent's action of removing the Petitioner from the clan's whatsapp group and publicizing defamatory materials against her;

ix) The 1st Respondent's order that all door locks be changed to deny the Petitioner access to any office, including the office of the Head of Sales & Marketing.

7. In her supplementary affidavit sworn on 16th January 2017, the Petitioner states that it is contemptuous for the 1st to 7th Respondents to retain the Acting Head of Sales & Marketing, Abraham Kiprotich, while there were orders reinstating her as the substantive Head of Sales & Marketing.

8. The Petitioner adds that the 7th Respondent's policy provides that an employee is only appointed in an acting capacity when the substantive holder exits the company or a vacant position is identified. Further, the maximum period for acting is six months after which the position is filled. The Petitioner cites several instances in which Abraham Kiprotich had performed the functions of Head of Sales & Marketing after the court order.

9. The Petitioner further depones that she had been denied access to the Sales and Marketing offices at Rapid Kate Complex on Mombasa Road where she was before the impugned redeployment. She says that she lacks necessary tools of work. She also complains that she has been denied privileges enjoyed by other heads of department including, a separate office, office assistance, car, driver and staff.

The Respondents' Response

10. The Respondents' response to the application is contained in a replying affidavit and a supplementary affidavit sworn by the 2nd Respondent, William Lay on 20th December 2016 and 9th May 2017 respectively.
11. In his replying affidavit sworn on 20th December 2016, Lay depones that on being made aware of the court order, the 1st to 7th Respondents convened an urgent meeting of the 7th Respondent's Board of Directors on 21st November 2016 to deliberate on among other things, the tenor and effect of the said order.
12. In the meeting of 21st November 2016, the Board passed a resolution that the court order be complied with and the decision to appoint the Petitioner to the position of Head of Special Projects be stayed pending further orders from the Court.
13. The Board further resolved to reinstate the Petitioner to the position of Head of Sales & Marketing pending further orders from the Court. This decision was communicated to the Petitioner by letter dated 21st November 2016.
14. Lay takes the view that the court order in issue did not make any reference to the revocation of the appointment of Abraham Kiprotich as the acting Head of Sales & Marketing. He adds that the effect of the Board decision taken on 21st November 2016 and letter to the Petitioner of even date was reinstatement of the Petitioner to her previous position of Head of Sales & Marketing.
15. Upon her reinstatement, the Petitioner was granted full access to the office ordinarily used by the Head of Sales & Marketing. The Petitioner was also availed all necessary facilities, including a chair, desk, computer and all other facilities together with support staff required to enable her discharge her functions as Head of Sales & Marketing effectively. Lay denies the Petitioner's averment that she had been denied access to office space and attendant facilities.
16. Lay agrees that on 22nd November 2016, the Petitioner was directed to develop a Sales & Marketing Business Plan for the financial year 2017/2018.
17. On the issue of leave, he depones that on 26th February 2016, the Head of Human Resource & Administration, John Ole Kimanjoi issued an internal memo to all Heads of Department advising them to enforce the 7th Respondent's Leave Policy, which prohibits accumulation of leave beyond 15 days.
18. On 29th November 2016, the 1st Respondent wrote to the Head of Human Resource & Administration directing that all Heads of Department and some of their direct reports proceed on leave in line with the 7th Respondent's Leave Policy. On 30th November 2016, the 1st Respondent issued an internal memo directing that all Heads of Department liaise with their staff to reduce their accrued leave days to manageable levels.
19. Lay states that the Petitioner was among the employees who had accumulated leave days in excess of the stipulated 15 days, standing at 37.09 days as at November 2016. The Head of Human Resource & Administration therefore issued an internal memo to her directing that she utilizes 20 days of her leave in the months of December 2016 and January 2017. According to Lay, the Petitioner was at liberty to apply to be exempted from taking her leave as directed, on the ground of exigencies of duty.
20. On 2nd December 2016, the Petitioner applied for 20 days' leave running from 5th December 2016 until 4th January 2017. On 2nd December 2016, the Petitioner wrote to the 1st Respondent indicating that she would be away for 26 days and would resume duty on 13th January 2017. Lay denies the suggestion that the Petitioner was sent on compulsory leave or that the request to her to take leave was an act of victimisation against her.
21. In his supplementary affidavit sworn on 9th May 2017, Lay sets out several stations within and outside the country, where the Respondent's offices are housed. He depones that the Sales & Marketing Department has a workforce of 72 employees, majority of whom are based at the 7th Respondent's Athi River offices. There is therefore no specific office where the entire Sales & Marketing Department resides as the team is scattered across the 7th Respondent's offices.
22. Lay states that the Petitioner was allocated an office at the 7th Respondent's Headquarters at Taj Towers and availed all the necessary facilities together with support staff to enable her discharge her functions as the Head of Sales & Marketing. He cites the following offices as being situated at Taj Towers:
 - a) The Chairman's office;
 - b) The Managing Director's office;
 - c) The Head of Legal and her team of 4 employees;
 - d) The Head of Audit and his team of 14 employees;
 - e) The 7th Respondent's Board of Directors' board room.

23. Lay also states that there are various other Heads of Department of the 7th Respondent whose offices are housed away from the teams they head, for instance:

- a) The Head of Production is housed at Athi River office while the team he heads is located elsewhere in satellite offices;
- b) The Head of Supply Chain is housed in the Athi River office while the team he heads, which includes logistics and stores is housed at various locations and weighbridge sites;
- c) The Head of ICT sits in the Athi River office while his team is scattered across the satellite offices;
- d) The Head of Administration sits in the Athi River office while the team he heads is scattered across the satellite offices.

24. Lay points out that it is not feasible for the entire sales team which is made up of 72 employees to be housed in any one office.

25. It is further deposed that in a bid to salvage and uplift the 7th Respondent's fortunes, the 1st Respondent, on 22nd November 2016, assigned the Petitioner the responsibility of developing a Sales and Marketing Business Plan for the financial year 2017/2018. The Business Plan was to be presented to the 7th Respondent's Board of Directors for consideration and if accepted to be implemented under the Petitioner's leadership.

26. The Petitioner had however not submitted the said Business Plan as directed.

27. Lay takes the view that the Petitioner is hiding behind the court order to commit acts of insubordination. He opines that the Petitioner appears to be engaged in a personal vendetta against the 1st Respondent and is using the 2nd to 7th Respondents as pawns.

Determination

28. Having set out the parties' cases, I now turn to the issues for determination before the Court and in my view, they are as follows:

- a) The nature of order issued by the Court on 11th November 2016;
- b) Whether the 1st to 6th Respondents are in contempt of the said order.

Nature of Court Order

29. In the introductory part of this ruling, I have set out the exact words of the order as recorded in my hand on 11th November 2016, when Counsel for the Petitioner appeared before me *ex parte*. I chose to reproduce the order verbatim for two reasons; first, because the parties in this dispute appear to have assigned their own meaning to the order and second, because during oral submissions by Counsel for the parties, an allusion was made that the Court may have inadvertently used unclear language.

30. Both premises are wrong. At the *ex parte* stage, the Petitioner made detailed prayers but the Court deliberately chose not to adopt any of them and instead crafted an order in its own words, to preserve the substratum of the subject matter, being the Petitioner's job which she claimed to be on the line. In doing this, the Court was alive to the fact that the 7th Respondent, being fully operational, may have made certain human resource adjustments affecting the position of Head of Sales & Marketing, previously held by the Petitioner.

31. The Court therefore made no order for reinstatement nor did it make any order affecting Abraham Kiprotich who at the time was acting Head of Sales & Marketing. All the Court did was to halt the Petitioner's deployment to the position of Head of Special Projects, which she claimed was non-existent and therefore an exit door from the Respondent's employment.

32. The intention was to have the Petitioner's application giving rise to the court order in issue heard *inter partes* within a short time but this was not to be. The contempt application kicked in and with unforeseen delays in the litigation chain, the main application and petition remain unresolved.

33. In the meantime, I left Nairobi station where the matter resides and only managed to complete hearing the contempt application during the service week in April 2018. After rendering myself on this application, I hope that my colleagues in Nairobi will move with speed to determine the substantive issues in this matter.

Are the 1st to 6th Respondents Guilty of Contempt of Court?

34. In submitting that the 1st to 6th Respondents were in contempt of court, Counsel for the Petitioner made reference to the decision in ***Republic v Kenya School of Law & 2 others Ex Parte Juliet Wanjiru Njoroge & 5 others [2015]eKLR*** where **Odunga J** pronounced himself as follows:

“In my view contempt of court is such a grotesque monster that the courts should hound it wherever it rears its ugly head and wherever it seeks to take cover behind any craft or innovation.”

35. It would appear however that the Petitioner's averments and submissions which detailed instances of contempt, were based on the premise of an order of reinstatement, which the Court did not make.

36. Counsel for the Respondents, referred to the decisions in *Hadkinson v Hadkinson 1952] All ER, Alken Connections Limited v Safaricom Limited & 2 others [2013] eKLR* and *Katsuri Limited v Kapurchand Depar Shah [2016] eKLR* where it was held that applications for contempt of court must be based on what the alleged contemnors were required to do.

37. Upon receiving the court order, the Respondents not only withheld the Petitioner's deployment to the position of Head of Special Projects but also went ahead to issue a letter reinstating her to the position of Head of Sales and Marketing. I find nothing to suggest that the Respondents' defied the court order. In fact, they went beyond what was required of them.

38. For the aforesaid reasons, the Petitioner's application dated 7th December 2016 fails and is dismissed. The costs of the application will be in the Petition.

39. In light of my view on the need to expedite the hearing and disposal of the substantive issues in this Petition, which I have already expressed in the foregoing parts of this ruling, I direct that the file be placed before the Principal Judge of the Court for directions.

40. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF MAY 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2018

ONESMUS MAKAU

JUDGE

Appearance:

Mr. Makokha for the Petitioner

Mr. Karori with Miss Ogula for the Respondents