



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2455 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 16th July, 2018)

H.F FIRE INTERNATIONAL INCORPORATED.....1ST CLAIMANT

H.F GIZA SYSTEMS (K) LIMITED FORMERLY

H.F FIRE INTERNATIONAL (K) LIMITED.....2ND CLAIMANT

VERSUS

SAYED HOSSAM MOHAMED

ELSHEBRAWI MOHAMED KHALIFA.....1ST RESPONDENT

INTELLIGENT BUILDING

MANAGEMENT SOLUTION LIMITED.....2ND RESPONDENT

RULING

1. The Application before Court is the one dated 18.8.2017. The Application was filed under Article 10 of the Constitution, Section 4(a), 5, 28(1) and 29 of the Contempt of Court Act, 2016 and all other enabling laws.

2. The Application is premised in the following grounds:-

1. That the Honourable Court be pleased to issue a notice to show cause against SAYED HOSSAM MOHAMED ELSHEBRAWI MOHAMED KHALIFA herein to show cause why he should not be committed to civil jail for a period not exceeding 6 months for disobeying/being in contempt of Court orders issued on 20th June 2017.

2. That the Honourable Court be pleased to issue an order for the committal of SAYED HOSSAM MOHAMED ELSHEBRAWI MOHAMED KHALIFA to be committed to serve 6 months imprisonment for disobeying the Court orders issued on 20th June 2017.

3. That in addition to being committed to civil jail, the Contemnor herein be ordered to pay a fine.

4. That the orders (1) and (2) be enforced by the Officer In-charge Station (OCS), Central Police Station.

5. That costs of this application be borne by the Respondents.

3. The Application is premised on the grounds that:

1. The Claimants filed the claim herein by way of a Memorandum of Claim dated 25th November 2016, Contemporaneously the Claimants filed an Application under Certificate of Urgency seeking interim orders and or reliefs.

2. The matter was taken before the duty Judge on 29th November 2016 who certified the matter as urgent and ordered that the Application be served and heard on 13th December 2016.

3. On 13th December 2016, the Respondents had appointed the firm of Ekuru Aukot and Company Advocates. Upon hearing the Advocates for the Claimants and the Advocates for the Respondents, the Honourable Lady Justice Wasilwa issued an order restraining the 1st Respondent from soliciting the employees of the Claimants pending the hearing and final determination of the Claimants' Application.

4. Though the said order was issued in the presence of the Respondents' Advocates, the same was extracted by the Claimant's Advocates and was served upon the said Advocates.

5. Further, in a ruling delivered on 20th June, 2017, the Honourable Lady Justice Wasilwa issued an Order restraining the Respondents from soliciting the employees of the Claimants.

6. The said ruling was read and the orders issued in the presence of the Respondents' Advocates.

7. Further, the Claimants' Advocates extracted the order issued on 20th June 2017 and the same was served upon the Respondent's Advocates on 30th June 2017.

8. Despite being aware of the Honourable Court Orders, the 1st Respondent has continued to solicit the employees of the Claimants.

9. In particular the 1st Respondent has been soliciting the Claimants' employees enticing them with better pay, these employees include Mohamed Amin and Douglas Mwirigi.

10. It is now a well established principal of our laws that notice of a Court order supersedes personal service. The contemnor was not only served but at all material times had notice of the existence of the Court Order herein.

11. The 1st Respondent knowingly and willfully disobeyed the Orders of this Court and should be cited for Contempt.

12. The actions of the Contemnors were solely aimed at undermining the authority and dignity of the Court.

13. That the stiff neck attitude expressed by the 1st Respondent in disobeying and undermining the authority of the Court is intended at showing the Court that he is above the law.

14. It is important that the 1st Respondent herein is punished to maintain public confidence in the administration of justice as administered by Court and to ensure observance and respect of due process.

15. The Claimants shall suffer extreme and irreparable damage/loss unless the orders prayed for herein are granted.

4. The Application is also supported by the Supporting Affidavit of one Mohamed Saad filed in Court on 18/8/2017 and deponed to on even date. The deponent is Director of 2nd Claimant and avers that he has authority of all the Claimants to swear the affidavit.

5. He exhibited the order of the Court and evidence of service. He also attached Appendix MS4 statements showing that the 1st Respondent has continued soliciting their employees.

6. He depones that the action of the 1st Respondent is contemptuous and he should therefore be punished to maintain public confidence in the administration of justice.

7. The Application was opposed by the 1st Respondent. He filed a Replying Affidavit dated 2.10.2017 on 3.10.2017. He has denied the allegations contained in the Applicant's Application.

8. The Applicant has deponed that on 8th May 2017, he got a call from a friend of his indicating that he had received a CV from an engineer called Douglas who claimed to be an expert in BMS System.

9. That at the time, the 2nd Respondent was looking for a BMS engineer to be located in Tanzania for a project there and had posted the advertisement in Linked In and Facebook. He then inquired as who his friend was and he learnt that it was one Douglas. He inquired about his expertise and in the process asked if he was committed to any job.

10. He learnt that Douglas was working for Giza System and that is the time he told him he could not employ him.

11. He avers that during the call he never mentioned his name nor the name of the 2nd Respondent and never gave him any offer.

12. As for the issue of one Mr. Mohamed Amin, the 1st Defendant has deponed that he knows him and had worked with him for 5 years

before he left Giza Systems (K) Limited.

13. He avers that contrary to the contention by the Applicants, it is Amin who sent him a message on 11.6.2016 on face book seeking for a job in his company. He turned it down. He annexed a copy of the extract from his Facebook account marked HSM2 as proof of his averment.

14. That he further avers that the Said Amin tried again to reach him through a company staff by the name Musa Dadani who he requested to ask him for a job claiming he was tired with his employer. He again turned him down.

15. That Mr. Amin later visited his office and sought for the job claiming that he had a brother residing in Tanzania and was ready to relocate if given the opportunity. The 1st Respondent still declined to give the job to Amin unless he was not committed to any other company.

16. 1st Respondent denies ever soliciting for the Applicant's employees and has turned down all employees who came to him seeking jobs. He therefore asks this Court to dismiss this application with costs.

17. The Parties agreed to dispose of this application by way of written submissions.

18. I have examined the submissions filed and the issues for determination are as follows:-

1. Whether the 1st Respondent has acted in breach of the Court orders dated 20.6.2017.

2. What orders to grant in the circumstances.

19. I would start by stating that on 20.6.2017, I granted the orders restraining the Respondents from soliciting for employees of the Claimant. I also directed that the status quo be maintained and parties were directed to take a hearing date on priority basis in order to determine this case at its earliest time possible.

20. Todate the parties have not sought a priority hearing date. However, the Applicants have submitted that the 1st Respondent has been soliciting for their employees contrary to this Court's orders dated 20th June 2017.

21. In support of this contention, they annexed two statements purportedly written by its two employees indicating that the 1st Respondent approached them and offered them jobs in his company. The issue is whether these two statements are evidence, which can be relied upon as evidence of the truth of what is deponed therein.

22. In Civil Appeal No. 140/2008, at Nairobi, **JJA Visram, Mwilu (as she then was) and Otieno Odek** rendered themselves as follows:-

“in Der Raj Sharma vs Reginam 1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marled for identification and that the few exhibits should be confirmed to articles which have been fairly probed and admitted in evidence. In the Nigerian case of Michael Hausa vs the State (1994) 7-8 SCANJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence”.

23. Whereas it could be argued that the Statements attached have been admitted in evidence as annexures on an affidavit their truthfulness cannot be ascertained as the affidavits have not been deponed to by the maker of the said statements.

24. The said individuals who made the statements, did not make them under oath, the circumstances under which the said statements were made are not made. The identity of the author is not verified, it cannot be ascertained who they really are or whether they work for the Applicants.

25. The statements would have been authentic if the makers would have been presented to Court for cross-examination and testing of the veracity of their statements.

26. The proceedings before me are quasi criminal in nature and would result in one being punished and even going to jail.

27. The evidence the Applicants rely on must be tested and beyond reasonable doubt. In **Duncan Manuel Murigi vs Kenya Railway Corporation (2008) eKLR**, the Honourable Court cited **Bramblevale Limited (1970) CH 128** at page 137 where Lord Denning Master of Rolls stated:-

“A contempt of Court is an offence of a criminal character . A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him”.

28. This position was replicated in the case of **Kasembeli Sanane vs Manhu Muli alias Fredrick Saname & 4 Others (2013) eKLR** where Hon. J. Anne Omollo held that “proof of contempt of Court must be beyond reasonable doubt”, referring to Odunga's digest at page 275 paragraph 67(1).

29. I do agree with the Respondent's submissions that the Applicants have not established acts of commission by the Respondent contemnor in contempt of this Court's order of 20.6.2017. I find the application without merit and I dismiss it accordingly.

Dated and delivered in open Court this 16th day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties