



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 79 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 27th September, 2018)

IN THE MATTER OF: IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 73, 75, 232, 235, 258, AND 259 OF THE CONSTITUTION KENYA, 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 41, 47 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF: OF THE COUNTY GOVERNMENT ACT, 2012 (ACT NO.17 OF 2012)

AND

IN THE MATTER OF: OF THE PURPORTED REVOCATION OF THE ENGAGEMENT OF THE PETITIONER TO AND/OR REMOVAL OF THE PETITIONERS FROM THE OFFICE OF THE MEMBERS OF MACHAKOS COUNTY PUBLIC SERVICE BOARD

BETWEEN

DOROTHY MWANZIA NG'ANG'A.....1ST PETITIONER

ANDREW KITUKU METHO.....2ND PETITIONER

FREDRICK MULI KASOA.....3RD PETITIONER

SCHOLARSTICAH MUENI MBOL.....4TH PETITIONER

PHILIP MULWA NZIOKA.....5TH PETITIONER

AND

MACHAKOS COUNTY GOVERNMENT.....1ST RESPONDENT

THE GOVERNOR, MACHAKOS COUNTY.....2ND RESPONDENT

THE COUNTY ASSEMBLY, MACHAKOS COUNTY.....3RD RESPONDENT

FRANCIS MWAKA.....PROPOSED 4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The Application before Court is the Notice of Motion Application dated 11.5.018. The Application was filed under Certificate of Urgency by the Petitioners herein and filed through a Notice of Motion brought under Rule 19 of the Constitution of Kenya (Supervisory Jurisdiction & Protection of Fundamental Rights and Freedom of the Individual) High Court (Practice Rules), Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Section 4 (1) (a) and 4 (2) of the Contempt of Court Act and all enabling provisions of the law.

2. The Application sought the following orders:-

- 1) ***THAT this application be certified as urgent and the same be heard ex-parte at the first instance.***
- 2) ***THAT summons be issued against the 2nd and 4th Respondents to appear before this Court and show cause why they should not be committed to civil jail for such term as the Court may deem just.***
- 3) ***THAT the 2nd and 4th Respondents be cited for contempt of Court and committed to civil jail for a term of six (6) months and/or be ordered to purge the contempt of Court on terms this Court will deem just.***
- 4) ***THAT in lieu of prayer 3 above the 2nd and 4th Respondents be cited for contempt of Court and fined a sum of Kshs. 200,000 each.***
- 5) ***THAT the Respondent do pay the costs of this application.***

3. The Application was based on the following grounds that:-

- a) ***The Petitioners obtained injunctive orders on 16th May, 2016 from Nzioki wa Makau J, restraining the 1st and 2nd Respondents from conducting interviews of applicants and appointing any person to the position of Members of the Machakos County Public Service Board pending hearing and determination of this Petition.***
- b) ***This notwithstanding, on 22nd December, 2017 the Petitioners herein received notices via letters from the County Secretary informing them that effective 1st February, 2018 their terms of engagement will change from full time to part time basis.***
- c) ***The Petitioners upon application to this Honourable Court obtained an order of stay of the Notice of the 1st Respondent issued to the Petitioners on 22nd December, 2017 changing their terms of engagement from full-time to part-time basis effective 1st February, 2018 from Wasilwa, J.***
- d) ***In spite of this the Respondents have continued to act in disregard of the aforementioned orders in what amounts to an abuse of the Court process.***
- e) ***To this effect on 20th March, 2018 the Petitioners were suspended from office vide letters issued by the 4th Respondent herein under the guise of "allowing investigations into allegations of their misconduct to take place."***
- f) ***Further, the decision of the Respondent was made arbitrarily and the Petitioners were not afforded the opportunity to be heard in violation of their right to fair administrative action protected under Article 47 of the Constitution of Kenya, 2010 and the Fair Administrative Action Act, 2015.***
- g) ***The Petitioners right to a fair hearing protected by Article 50 of the Constitution will also be severely compromised if the suspension of the Petitioners is not suspended and the Petitioners given the requisite peace and quiet to litigate this matter without coercion and illegitimate pressure by the Respondents.***
- h) ***The 1st and 2nd Petitioners upon application to the Court vide an application dated 5th April, 2018 obtained orders from Aboudha, J that stayed the decision of the 1st and 2nd Respondents contained in the letter dated 20th March, 2018 to suspend the 1st and 2nd Petitioners from their positions until 23rd April, 2018.***
- i) ***Despite the above orders being still in force the "1st, 2nd and 4th Respondents have not lifted the suspension of the 1st and 2nd Petitioners and continue to withhold payment of the salaries of the 1st and 2nd Petitioners.***
- j) ***Further, the 1st and 2nd Respondents have unlawfully boarded and closed the offices of the 1st and 2nd Petitioners to ensure that they cannot perform their jobs.***
- k) ***The CPSB of Machakos cannot operate lawfully for lack of quorum and consequently, the 2nd Respondent and his subordinates have usurped the functions of the CPSB.***
- l) ***The Respondents herein are undoubtedly in contempt of this Court's orders.***
- m) ***Other grounds and reasons to be adduced during the hearing of this application.***

4. The Application is also supported by the Supporting Affidavit of the Petitioner sworn by Dorothy Mwanzia Ng'ang'a who swear that she has the authority of the 2nd Petitioner to swear this Affidavit. In the Affidavit, the deponent deposes upon issues raised in the above grounds and has annexed evidence of the letters written to them plus the orders of the Court that were flouted. They therefore want this Court to issue summons to the contemnors to show cause why they should not be punished for contempt of Court.
5. The Respondents opposed this Application. They filed their Replying Affidavit deposed to by one Francis Kiio Mwaka the 4th Respondent herein who avers that he has sworn the affidavit on his behalf and on behalf of the 1st and 2nd Respondent.
6. He deposes that he is aware of the orders of the Court dated 31.1.2018 and 6.4.2018 respectively given by this Court. He avers that they are in total compliance of the two orders. He avers that the Notice to change the Petitioners' terms issued by the 4th Respondent was withdrawn in compliance with orders issued on 31.1.2018 and that the Members of the Machakos County Public Service Board are working on full time basis.
7. He avers that Members of the Machakos Public Service Board have never been provided with official cars and that at no point did he sent CID officers to remove 1st and 2nd Petitioners from office.
8. He denies that the General Oversight Committee held a meeting on 20th March 2018. He aver that the said Committee never issued invitation letters which the 1st and 2nd Petitioners have failed to prove.
9. The Respondents contend that they have on various occasions asked the County Public Service Board to provide contract documents but they have declined to do so. They however depone that the Machakos County Assembly Oversight Committee is not barred by the orders of this Court from summoning the Petitioners to appear before them. They however aver that there is no proof that they have been summoned to appear before the said Committee.
10. The Respondents further contend that the Petitioners were requested to step aside after Members of the Public complained that the Petitioners were soliciting and receiving bribes from them to get employed as officers of the County Government which is contrary to Article 76(2)(b) and also in breach of Section 12 of the Leadership and Integrity Act No. 19 of 2012.
11. They also aver that serious allegations of abuse of office have been levelled against the 2 Petitioners who have been employing their relatives thereby contravening the provisions of Articles 10, 73(1)(b) and 232 of the Constitution.
12. The Respondents accuse the 1st and 2nd Petitioners of nepotism and abuse of office and allege the 2 attended a Law Society of Kenya (LSK) Forum in Kwale County in 2016 and received allowances from public funds which their employment is not connected to the events they attended.
13. The Respondents further aver that 1st and 2nd Petitioners have absconded duty even after their salaries and allowances were paid. The Respondents aver that the Application is not merited and should be dismissed accordingly.
14. This Application was dispensed with by way of written submissions.
15. The Petitioner has submitted that indeed the Respondents have committed acts and/or omissions contemptuous in nature and so should be punished. They aver that the Respondents have not adhered to the Court orders as they claim to, as the Petitioners have not received their salaries for March, April and May 2018 which is in breach of their contractual obligation.
16. The Respondents on their part submitted that no acts of contempt have been committed by the Respondents to warrant grant of orders sought. Contempt of Court has been defined under Section 4(1) (a) of the Contempt of Court Act 2016 as follows:-
- “Section 4(1)(a) – Contempt of Court includes civil contempt which means willful disobedience of any judgement, decree, direction, order or other process.***
17. Black's Law Dictionary 11th Edition on the other hand defines Contempt of Act as:-
- “Committed by a person who does any act in willful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the Court's authority as a party to a proceedings therein, willfully disobey its lawful orders or fails to comply with any undertaking which he has given”.***
18. The question this Court then needs to answer is whether the Respondents had acted or omitted to do anything in willful disobedience of the orders of this Court. The Respondents deny this in total.
19. I revisit the orders given by this Court. The 1st order of this Court was given by this Court on 16/5/2016 by Nzioki Wa Makau Judge restraining 1st and 2nd Respondents from conducting interview of Applicants and appointing any person to the position of Members of the Machakos County Public Service Board pending hearing and determination of this Petition.
20. Another order was issued by Court on 31/1/2018, staying the Notice of the 1st Respondent issued to the Petitioners on 22.12.2017 changing their terms of engagement from full time to part time basis with effect from 1st February 2018 (J. Wasilwa).

21. On 6/4/2018 J. Abuodha issued another order staying the decision of the 1st and 2nd Respondent contained in the letter dated 20.3.2018 to suspend the 1st and 2nd Petitioners from their positions as Members of the Machakos County Public Service Board until hearing of the Application interpartes.

22. The Applications above are yet to be determined but the interim orders have been extended over time.

23. In the intervening period, the Applicants filed the current application for contempt. They aver that despite the orders of 16.5.2016, they received letters notifying them of the change of their terms of engagement from full time to part time effect 1.2.2018. The Petitioners got orders to stay that decision.

24. The Applicants now aver that they were suspended from office by the Respondents in the guise of allowing investigation into allegations of their misconduct to take place. This decision was again stayed by this Court (Abuodha J).

25. The Applicants contend that they are still being held without salaries being paid. They also indicate that their offices have been closed by the Respondent and the 2nd Respondent has usurped the powers of the County Public Service Board. The Applicants therefore aver that the Respondents have committed acts of contempt.

26. The orders given by this Court amount to orders restoring the Applicants to their position as Members of the County Public Service Board of Machakos. By virtue of the said orders, the Applicants are expected to continue discharging their functions to that office without any disturbance. Their salaries should also continue being paid as expected when they fall due.

27. The Applicants contend that their offices have been closed and they have not received their salaries since March, April and May 2018. To this, the Respondents offered no defence but only put the Applicants to proof. The only way the Respondents can prove this is to provide proof that they have not treated the Applicants differently and provide proof that they have paid salaries demanded. This, they have not done.

28. The Respondents contention is that the Applicants have committed acts of abuse of office and bribery. That in my view is a criminal issue, which should be dealt with the Ethics and Anti-Corruption Commission and should not be a bar to honoring the orders issued by this Court.

29. The acts committed by the Respondents of not allowing Applicants to continue performing their duties and not paying their salaries as ordered by Court is an act of contempt. The Applicants produced their salary bank statements to show their salary has not been paid to date.

30. My finding is that the acts by the Respondents are contemptuous and are therefore punishable by law. The acts fall contrary to Section 4 of the Contempt of Court Act. I therefore allow the Application in terms of the Application and order summons to issue against the 2nd and 4th Respondents to explain why they should not be held in contempt of Court.

31. Costs in the cause.

Dated and delivered in open Court this 27th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Joba holding brief for Kibe Mungai for the Petition/Applicant – Present

Respondent – Absent