



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1992 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 24<sup>th</sup> September, 2018)**

**PROF. KIRIMI H. KIRIAMITI.....CLAIMANT/APPLICANT**

**-VERSUS-**

**DR. CHARLES MBUI.....1<sup>ST</sup> RESPONDENT**

**MAURICE O. OKOTH.....2<sup>ND</sup> RESPONDENT**

**KENYA METHODIST UNIVERSITY.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Application before this Court is one dated 26<sup>th</sup> February 2018 brought pursuant to Section 5 of the Judicature Act (Cap 8), Section 1A, 1B and 3A of the Civil Procedure Rules (2010), Laws of Kenya, Order 51 rule 1 and Order 40 rule 3 of the Civil Procedure Rules (2010), Section 13 of the Employment and Labour Relations Court Act No.20 of 2011 and all other enabling provisions of the law seeking orders:

***a. That the officials of the 3<sup>rd</sup> Respondent herein particularly Dr. Charles Mbuy and Maurice O. Okoth be committed to civil jail for contempt of Court for flagrantly and deliberately disobeying this Honourable Court orders issued on 6/10/2017 and the express orders of the Court issued 22/11/2017.***

***b. That costs be awarded to the Applicant.***

2. The Application which is supported by the affidavit of Prof. Kirimi H. Kiriamiti is premised on the grounds:

***1. That the officials namely Dr. Charles Mbuy and Maurice O. Okoth have flagrantly and deliberately disobeyed orders of injunction on issued by the Honourable Court on 6/10/2017 aimed at stopping and/or halting the termination of employment by the Applicant herein despite being aware of the said orders by virtue of being the 3<sup>rd</sup> Respondent officials herein.***

***2. That they have even refused to release to the Claimant his salary for the months of October to date, even after being ordered to release the same on 22/11/2017 in this Honourable Court.***

***3. That unless Dr. Charles Mbuy and Maurice O. Okoth herein are held accountable and punished for the blatant disregard of the said orders the Court issued, they will continue to disobey said orders and thus will also continue to lower the dignity of this Honourable Court.***

***4. That the culture of disobeying the Court orders and decision has reached very high levels in Kenya and the Courts must now exercise their authority of punishing people contempt of Court.***

***5. That the instant Application herein is merited and made in utmost good faith and in the best interest of all parties concerned.***

3. The 1<sup>st</sup> Respondent filed his Replying Affidavit where he avers that he became aware of the Court orders made on 6<sup>th</sup> October 2017 on 9<sup>th</sup> October 2017 and on 10<sup>th</sup> October 2017 which was 3 days after the said order was issued.

4. He states that he was notified of the Court order on 10<sup>th</sup> October 2017 when a scanned copy was sent to him via email from the university's main campus situated in Meru and that at the date of receipt of the Court order, a decision to terminate the employment of the Claimant had been made and the letter of dismissal sent to him via email.

5. He says that the Claimant received the letter dated 5<sup>th</sup> October 2017 declining to adjourn the disciplinary process and resolved to move to Court for the purpose of stalling the disciplinary enquiry therefore the Claimant cannot allege not to have received the letter of termination sent to him via email on 6<sup>th</sup> October 2017.

6. He further avers that there is no evidence that the Court order made on 6<sup>th</sup> October 2017 was served personally to him as the identity of the person served is not clear and the person served is not party to these proceedings. Therefore, the Respondent cannot be held to be in contempt of Court for terminating the services of the Claimant.

7. He states that having been apprehensive that the Claimant would interfere with the preparations for the graduation and the actual graduation, he wrote to the Claimant asking him to stay out of the university and refrain from interfering with the operations of the university but instead on 2<sup>nd</sup> November 2017 the Claimant once again stormed the 2<sup>nd</sup> Respondent's office and interfered with the normal operations of the university forcing them to request assistance from the local police to have the Claimant refrained from interfering with the operations of the university.

8. He further states that the Claimant has not sought reinstatement to employment and neither has he explained how he obtained the unsigned copy of the dismissal letter because a signed copy was delivered to his Meru residence.

9. He states that at the time of service of the Court order, measures had been put in place for the seamless running of the university in absence of the Claimant including allocation of duties regarding the graduation, which took place on 14<sup>th</sup> October 2017. It is therefore critical to balance the interests of the parties herein by hearing the application filed by the university seeking to set aside the orders made on 6<sup>th</sup> October 2017 as well as the subsequent orders. It is also against the interest of justice to condemn the 3<sup>rd</sup> Respondent to pay salaries to an employee which has been terminated without a determination as to the legality or otherwise of the termination.

10. The 2<sup>nd</sup> Respondent also filed his Replying Affidavit where he avers that he became aware of the Court order made on 6<sup>th</sup> October 2017 on 10<sup>th</sup> October 2017 which was 4 days after the said order was issued and the letter of dismissal was sent to the Claimant on the same day at about 6:19 pm as the parties had been communicating via email from July 2017. Therefore, it follows that the Application filed on 6<sup>th</sup> October 2017 had been overtaken by events as the circumstances of the dispute had materially changed.

11. He states that it is not possible to implement the Court order made on 6<sup>th</sup> October 2017 as the said compliance will equate to reinstatement of the Claimant to employment without hearing and determination of the Respondent's grievances. Therefore, it is in the interest of justice that the Application be dismissed with costs, as the Claimant has not demonstrated breach of the Court order or service of the same.

12. He further avers that he has been maliciously cited for contempt of Court as he did not participate in the Council meeting leading to the dismissal of the Claimant and that the order served upon the university on 9<sup>th</sup> October 2017 and 10<sup>th</sup> October 2017 is incapable of performance and/or performance of the same will occasion great hardship and confusion at the university therefore it is critical to balance the interest of the parties herein by hearing the Application filed by the university seeking to set aside the orders made on 6<sup>th</sup> October 2017.

13. He also urges the Court to consider the interests of all parties and in particular, the fact that the Claimant rushed to Court on the day set for the disciplinary hearing with a clear intention of circumventing the university internal procedures and the orders obtained were not warranted in the circumstances.

### **Submissions**

14. The Claimant filed his submissions where he submits that the regime of contempt of Court is guided by the Judicature Act Cap 8 at Section 5, therefore he emphasizes that the orders granted on 6/10/2017 were operative onwards to date and the same has not been appealed against nor set aside and such, the living order to be obeyed by the Respondents no matter how unsatisfied they may see the order to be. Therefore, the Respondents ought to be punished for contempt of Court to safeguard the rule of law, which is fundamental in the administration of justice. He relied on the case of **Teachers Service Commission Vs Kenya National Union of Teachers and 2 Others (2013) Eklr.**

15. He therefore seeks that the Application dated 26/2/2018 to be allowed and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be found guilty of contempt and subsequently to be committed to civil jail in a period to be determined by this Honourable Court.

16. The Respondents filed their submissions where they submit that it is not clear why the Claimant has cited the 2<sup>nd</sup> Respondent for the contempt of Court as he was not a party to the suit at the time when the order was issued.

17. They aver that the decision of the Council members binds the 3<sup>rd</sup> Respondent and the 1<sup>st</sup> Respondent has been isolated and discriminated against in these proceedings. They state that the burden of proving service of the Court order lay with the Claimant, to prove service by way of a watertight affidavit of service as there was no personal service upon the 1<sup>st</sup> and 3<sup>rd</sup> Respondent with the Court order of 6<sup>th</sup> October 2017 on any date earlier than 10<sup>th</sup> October 2017. They relied on the case of **Sam Nyamweya & 3 Others Vs Kenya Premier League Limited & 2 Others [2015]**

18. They therefore state that it is in the interest of justice that parties herein do resolve the outstanding issues as sought in the 1<sup>st</sup> interlocutory Application.

19. I have considered the averments of both parties. I note that the Claimant/Applicant approached this Court on 6/10/2017 under Certificate of Urgency and obtained ex parte orders in the following terms:-

1. ....

**2. That the suspension of Prof. Kirimi H. Kiriamiti is hereby lifted and the entire disciplinary process and any subsequent action including employment termination planned to be undertaken against him by the Respondents be halted pending the hearing and determination of this Application.**

**3. The Application be served and be responded to within 14 days for inter-partes hearing on 30<sup>th</sup> October 2017.**

**4. That interpartes hearing be on 30<sup>th</sup> October 2017.....”.**

20. The Applicant avers that he served this order on 9<sup>th</sup> of October 2017 as evidenced from the Affidavit of Service of one Samson K. Mulei (Annexure 2 of the Applicant’s Supporting Affidavit).

21. Service upon the Respondent is acknowledged by the Respondents in their Replying Affidavit - one by DR. Charles Mbui dated 7<sup>th</sup> March 2018 at paragraph 3 and 4 of the said Affidavit and one by Prof. Maurice Okoth dated 7<sup>th</sup> March 2018 at paragraph 4 and 5 of the said Affidavit. In the said Affidavits Dr. Charles Mbui acknowledged receipt of the Court order on 9.3.2017 and Prof. Maurice Okoth on 10.3.2018.

22. Dr. Mbui however depones that by the time they received this order, a letter of dismissal dated 6.10.2017 had been emailed to the Claimant on 6.19 pm. Dr. Mbui attached the email in question with the letter of summary dismissal.

23. The Respondents aver that they had been communicating with the Applicant by email from July 2017 and he had even received the letter declining to adjourn the disciplinary hearing on 5.10.2017 and so could not have failed to receive the letter of dismissal on 6.10.2017.

24. The Applicants on their part contend that though the Respondents received the Court order, they issued the Applicant a termination letter on 13.10.2017 as per Annex 3 which is the delivery note which the Applicant acknowledged receipt of.

25. The issue for Court’s determination is whether the Respondents had already terminated the Applicant by the time the orders of this Court were served upon them.

26. The orders of this Court were served upon the Respondents on 9<sup>th</sup> and 10<sup>th</sup> October 2017 as acknowledged.

27. It is also true that the Applicant received the dismissal letter (hand copy) on 13/10/2017 as per the delivery book Appendix RK3. The dismissal letter is however dated 6.10.2017 and it is indicated on the face of it that an advance copy had been send by email.

28. The Respondent avers that they served the Applicant with an advanced copy of his summary dismissal letter on 6/10/2017 through email, as had been the norm of communicating with the Applicant from July 2017.

29. The Applicant has not denied receipt of an advance copy of the dismissal letter through email. He has not even denied that the email in question is his email.

30. The Court of Appeal in **Justus Kariuki Mate and Another (CA 24/2014)** Nyeri, the Learned JJA Visram, Koome and Odek held that personal service of a Court order is no longer mandatory. The Court stated as follows:-

***“On the other hand, however, thus it has slowly and gradually moved from the position that services of the order along with penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under rule 81.8(1)”.***

31. In **Basil Criticos vs AG and Others (2012) eKLR** Lenaola J (as he then was) also pronounced himself as follows:-

***“...The law has changed and as it stands today, knowledge supersedes personal service..... where a party clearly acts and shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary”.***

32. Whereas the Respondents have deponed that the Applicant received his dismissal letter via email, the Applicant has also not disputed the same. It is my finding that the Applicant was served with a dismissal letter after the Court orders barring dismissal.

33. In the circumstances, I do not find that the Respondents acted in contempt of the order served upon them on 9.10.2017. In the circumstances, the Application for contempt must fail, the same having been served after the fact.

34. Costs in then cause.

**Dated and delivered in open Court this 24<sup>th</sup> day of September, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Muli holding brief for Mukabane for the Claimant – Present

Thuo holding brief for Ngonde for the Respondent – Present