



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.1539 OF 2016**

**EDWARD AWITI ..... CLAIMANT**

**VERSUS**

**ELIMU SACCO SOCIETY LIMITED ..... RESPONDENT**

**RULING**

The claimant by application and Notice of Motion dated 7<sup>th</sup> July, 2017 is seeking for orders that;

- a) *The Court cites the following persons for being in contempt of a court order;*
  - i. *Edwin Otieno Joseph (National Chairperson, Elimu Sacco Society Limited)*
  - ii. *Agnes A Nyanjong' (General Manager, Elimu Sacco Society Limited)*
- c) *That an order of committal to civil jail be made against;*
  - i. *Edwin Otieno Joseph (National Chairperson, Elimu Sacco Society Limited)*
  - ii. *Agnes A Nyanjong' (General Manager, Elimu Sacco Society Limited)*

*For a period as this court may deem fit and just in that they have blatantly disobeyed express orders made herein by the court on 24<sup>th</sup> day of May, 2017.*

1. The application is supported by the affidavit of the claimant and on the grounds that on 24<sup>th</sup> May, 2017 the court issued orders herein in the nature of an interim injunction restraining the respondent from publishing, printing, circulating or distributing defamatory statements against the claimant in relation to the alleged theft. The interim orders also compelled the respondent chairman to withdraw the defamatory statements and subsequently expunge the same from the respondent's records. The respondent was also required to retract statements published in 7 days save that where there was any on-going judicial proceedings against the claimant the same was not to be affected by the interim orders.

2. The respondent was to be served with the orders and attend herein on 14<sup>th</sup> June, 2017. A penal notice was also issued.

3. In blatant contempt and despite the respondent seeking 21 more days to enable them organise for its annual general meeting, there is no compliance with the court orders. This is in blatant abuse of orders and judicial process. The extension requested for was granted but the respondent chose to change advocates but has not acted as directed by the court. the claimant's reputation continues to suffer with

very day the order is disobeyed and unless the court intervenes, there will be great injustice.

4. In reply, the respondent filed Replying Affidavit of Angela Nyanjong' the General Manager of the respondent and avers that upon filing suit and being served by the claimant, they instructed advocates to entire appearance and defend the same. The claim is that on 23<sup>rd</sup> June, 2016 and 28<sup>th</sup> June, 2016 the respondent caused to be published matters and cautioning its members and general public from dealing or undertaking any transactions with the claimant on behalf of the respondent. on 25<sup>th</sup> April, 2017 the claimant caused to be filed an amended Claim and avers that the respondent's chairman in the annual general meeting made statements which referred to investigations being undertaken by the police at Homa Bay police station against the claimant on alleged collusion and fraud against the respondent.

4. Ms Nyanjong also avers that in the Amended Claim, the claimant raised the issue of defamation as an issue subject for the courts determination and has sought redress and thus the questions of defamation is a substantive matter in the claim. The respondent has not yet been given a hearing on merit.

5. The respondent's chairman read a statement on 11<sup>th</sup> February, 2017 and the claimant obtained orders on 24<sup>th</sup> May, 2017 a date after the same when the interim orders were granted and after such date the claim was amended. The application for contempt is therefore made in bad faith.

6. The orders issued against the respondent were not clear and remain ambiguous and in this regard, from the date the orders were issued the respondent has not published any defamatory matter on the claimant since 23<sup>rd</sup> May, 2017 and the direction to expunge any matter of the claimant was not clear in the action to be taken and he duty is upon the claimant to proof his case that there is disobedience o court orders which has not been done. The orders issued were final in nature and without giving the respondent a fair chance to argue its case and thus denial of the right to a fair hearing.

7. The respondent has since changed advocates to be able to file defence and have the matter heard on merit. This was not to circumvent justice but to allow both parties be given a hearing. There is therefore no wilful disobedience of the court orders and the application dated 7<sup>th</sup> July, 2017 should be disallowed and the main claim set down for hearing.

8. Both parties made their oral arguments in court.

#### Determination

9. On 5<sup>th</sup> August, 2016 the claimant moved the court through his Notice of Motion and application and was granted orders in the nature that;

*2. that the respondent do provide a specific time frame within which it shall communicate its decision to the applicant [claimant] in as far as the notice to show cause is concerned.*

*3. that the Application be served and same be responded to within 10 days That interparty hearing on 5<sup>th</sup> September 2016.*

10. The above application and the interim orders issued were premised on the grounds that the claimant had on 4<sup>th</sup> June, 2016 while the claimant was at work he discovered fraudulent activities in the respondent office and he commenced investigations and reported the incident to the head office. On 14<sup>th</sup> June, 2016 he was summoned for interrogations and then issued with a notice to show cause why he should not be disciplined over the matter he had reported. The claimant responded to the show cause and submitted the same but on 23<sup>rd</sup> June, 2016 the respondent went ahead and published in the media that the claimant had no authority to undertake any transactions on behalf of the respondent. this publication was repeated on 28<sup>th</sup> June, 2016. The claimant was also put on half pay.

11. On 5<sup>th</sup> September, 2016 when the matter came up for hearing the claimant was absent and the

respondent applied to have more time to file reply.

12. On 24<sup>th</sup> May, 2017 the claimant moved the court under Certificate of Urgency and Notice of Motion and seeking for orders that the respondent be restrained from publishing, printing, circulating or distributing defamatory material against him and that the published material be expunged from the respondent's records. Interim orders were granted in the nature that;

*1. That interim an injunction is hereby issued restraining the respondent by itself, its respective servants or agents from publishing, printing, circulating or distributing defamatory statements against the applicant/claimant in relation to the theft.*

*2. In the interim an order compelling the respondent's chairman to withdraw his defamatory statement and subsequent expungement of the same from the respondent's records is hereby issued.*

*3. The respondent to retreat [retract] statements in terms of prayer (3) within 7 days, save that where there are any on-going judicial proceedings against the claimant the same shall not be affected by the orders above.*

13. It is this background that the claimant thus has filed the application as set out above. That the respondent has disobeyed the orders issued on 24<sup>th</sup> May, 2017 and should be sanctioned for contempt of court.

14. Has the respondent thus published defamatory material of the claimant and against him? Has the respondent withdrawn defamatory statements and or expunged the same from its records?

15. I find no evidence that save for media notices of 23<sup>rd</sup> and 28<sup>th</sup> June, 2016 the respondent has issued any other public matter of against the claimant. However, with regard to expunging from its records defamatory materials of the claimant from its records, the respondent is not clear on exactly what has been done to address this fact. The respondent has taken the option of avoid the same by going into matters not relevant in this regard. That they were not able to reply to the matters herein in good time due to change of advocates and that the right to be heard has been denied of the respondent. this I find is done to avoid the substantive issue at hand.

16. However, the above put into account, the claimant does not set out what defamatory material, statements of the respondent's chairman concerning him should be specifically be removed from his records. Where the respondent's chairman has made a statement, such is his statement. Where the statement thus made and touch on the person of the claimant, such are not part of the records of the claimant. These are the records of the respondent.

17. To allow the orders sought and punish the respondent officers as cited without delving into the foundation of the claim and for the claimant to give his evidence as to the nature of material(s) said to be defamatory of him and thus should be expunged from the record, this would be to address a essential matter herein at an early stage without due regard to the whole claim and thus deny the court crucial evidence and material as to how such a claim arises.

**The best cause of action for the court is to hear the claim on its merits and address all the pertinent issues herein. The application dated 24<sup>th</sup> May, 2017 is hereby declined. Parties to take a hearing date for the claim.**

Delivered in open court at Nairobi this 28<sup>th</sup> day of September, 2017.

**M. MBARU JUDGE**

In the presence of:

David Muturi & Nancy Bor: Court Assistants

.....