



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 34 OF 2016**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**IN THE MATTER OF ARTICLES 10, 22, 23, 73, 75, 153, 232, 258 AND 259 OF THE  
CONSTITUTION OF THE REPUBLIC OF KENYA**

**IN THE MATTER OF THE NON-GOVERNMENTAL ORGANISATIONS COORDINATION  
ACT (CAP 19) OF 1990**

**IN THE MATTER OF MWONGOZO (CODE OF GOVERNANCE FOR STATE  
CORPORATIONS)**

***BETWEEN***

**SHEBBY SAKWA.....1<sup>ST</sup> PETITIONER**

**DAVIES NJUGUNA.....2<sup>ND</sup> PETITIONER**

***-VERSUS-***

**FAZUL MAHAMED.....1<sup>ST</sup> RESPONDENT**

**NGOS COORDINATION BOARD.....2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF DEVOLUTION PLANNING...3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL OF KENYA.....4<sup>TH</sup> RESPONDENT**

**Mr. Kanyonge for 1<sup>st</sup> petitioner/applicant**

**Mr. Okuta for the respondents**

**Victor Kamau for Amicus Curiae**

**RULING**

1. Serving before court is a notice of motion application dated 25<sup>th</sup> January, 2017 seeking the following orders:-

2. That the Executive Director of the NGOs Coordination Board Mr. Fazul Mahamed be and is hereby cited for contempt, convicted and committed to civil jail for a period not exceeding six (6) months, or such other sentence as may be found fair and just in the circumstances.
3. That the costs of this application be provided for.
4. The application is supported by grounds set out on the face of the notice of motion as follows;
5. That on 11<sup>th</sup> April 2016, the 1<sup>st</sup> petitioner/applicant herein was granted interim orders in this matter directing the 1<sup>st</sup> respondent to refrain from dismissing and replacing members of staff of the NGOs Coordination Board by Hon. Justice Abuodha J. N.
6. That even after receipt of these orders, the 1<sup>st</sup> respondent gave specific instructions to the security guards of the buildings housing the offices of the NGOs Coordination Board not to let her anywhere near the premises inspite of receipt of the said court orders.
7. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents thereafter sought a variation of the order and the same was granted by Hon. Justice Nderi Nduma on 27<sup>th</sup> April 2016.
8. That the order varied by the learned Judge was to the effect *“that the order granted by Abuodha J. N. on 11<sup>th</sup> April 2016 be and is hereby to apply to the 1<sup>st</sup> petitioner.”*
9. That even after this order was issued, the 1<sup>st</sup> respondent refused to allow the 1<sup>st</sup> petitioner/applicant to resume her duties as an employee of the NGOs Coordination Board.
10. That until to date, the 1<sup>st</sup> petitioner/respondent has tried without success to return to work and has as a result suffered great financial and psychological distress.
11. That it is in the interest of justice and for the purposes of upholding the dignity and honour of this Honourable court, that orders must be obeyed.
12. That the 1<sup>st</sup> petitioner/applicant has no other means of enforcing the Honourable court’s order issued on the dates hereinabove stated.
13. That the action by the aforementioned contemnor Mr. Fazul Mahamed is impeding the cause of justice and therefore is interfering with the authority of this Honourable court.
14. The application is further supported by the supporting affidavit of Shebby Sakwa, the 1<sup>st</sup> petitioner, applicant sworn on 24<sup>th</sup> September 2017. The affidavit contains material averments that support the grounds set out herein above.

## **Response**

15. The application is opposed vide a replying affidavit of Lindon Nicolas Otieno, the Head of operations, compliance and Research and Legal Manager of the 2<sup>nd</sup> respondent sworn on 31<sup>st</sup> January 2017.
16. The nub of the opposition is as follows;

The 1<sup>st</sup> petitioner is a former employee of the 2<sup>nd</sup> respondent having been summarily dismissed from employment for gross misconduct on 22/2/2016. The 1<sup>st</sup> petitioner acknowledged receipt of her letter of summary dismissal by signing on it on 31/3/2016. A copy of the letter of summary dismissal is annexed and marked Appendix 2.

17. The 1<sup>st</sup> and 2<sup>nd</sup> respondent moved the court under a certificate of urgency application dated 26/4/2016 before Justice Nderi Nduma and successfully varied the court orders issued by Justice Abuodha on 11/4/2016 to specifically apply to the 1<sup>st</sup> petitioner only. A copy of the court order issued on 27/4/2016 by Justice Nderi Nduma is annexed and marked Appendix 3.

18. The petitioners' application dated 8/4/2016 upon which court orders were granted before Justice Abuodha on 11/4/2016 was based on willful misrepresentations and non-disclosure of material evidence to this Honourable court by the petitioners. In particular the petitioners misled the court that:

- a) The recruitment process being undertaken was irregular and unauthorized.
- b) The positions then advertised and recruited for required approval of the Board of the NGO-Coordination Board and therefore the 1<sup>st</sup> and 2<sup>nd</sup> respondents were undertaking recruitment irregularly.
- c) That there was a general ongoing freeze on the recruitment for the positions for which 1<sup>st</sup> and 2<sup>nd</sup> respondents were recruiting.
- d) That the 1<sup>st</sup> respondent was replacing staff who had raised issues against his suitability to serve as Executive Director.

19. Due to the above misrepresentations and material non-disclosure by the petitioners, on 27/4.2016 the Honourable court varied the court orders issued by Justice Abuodha.

20. It is the respondent's submissions that, since the petitioner was summarily dismissed on 22<sup>nd</sup> February 2016, as at the time, Hon. Abuodha J. issued the order dated 11<sup>th</sup> April 2016 and subsequently varied by Hon. Nduma J. on 27<sup>th</sup> April 2016, the applicant was no longer an employee of the 2<sup>nd</sup> respondent, yet the order had the effect of stopping the 1<sup>st</sup> respondent from dismissing, recruiting and replacing a member of staff of the respondent in the position (Administrative Assistant) formerly held by the 1<sup>st</sup> petitioner.

21. That the orders issued by the court could not have had the effect of reinstating the 1<sup>st</sup> petitioner into employment after being summarily dismissed on 22<sup>nd</sup> February 2016.

22. That such reinstatement could only be ordered upon hearing and determination of the claim on merits but not at interlocutory stage and ex parte for that matter.

23. That this application seeks to have the 1<sup>st</sup> petitioner reinstated through the back door, it is misconceived, bad in law and it be dismissed with costs.

24. The Kenya National Commission on Human Rights (KNCHR) was admitted in this matter as Amicus Curiae and filed Amicus brief dated 19<sup>th</sup> June 2017.

### **Determination**

25. The court delineates issues for determination as follows;

- (i) Were the 1<sup>st</sup> and 2<sup>nd</sup> respondents in willful defiance of the order of the court issued on 11<sup>th</sup> April 2016 and varied on 17<sup>th</sup> April, 2016 and therefore guilty of contempt of court.
- (ii) If answer to (i) above is in the affirmative, what remedy is available in the matter.

### **Issue (i)**

26. This application was filed on 25<sup>th</sup> January 2017, after the Contempt of Court Act No. 46 of 2016 had come into effect on 13<sup>th</sup> January 2017.

27. The acts complained of took place before the commencement date of the said Act, and therefore, the Act, is not applicable to this application.

28. However, section 20 of the Employment and Labour Relations Court Act, Chapter 234B provides;

*“(7) A person who –*

*(a) Without reasonable cause fails to comply with an order duly given under subsection (4); or*

*(b) is required by an order made under subsection (4) to furnish information, and who makes any statement or furnishes any information which the person knows, or has reasonable cause to believe, to be false or misleading in material particular, commits an offence and shall, on conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or to both.”*

*(8) if an order made under subsection (4) is directed to a-*

*(a) firm or to a body corporate, every partner of the firm and every director and officer of the body corporate shall comply with the order; or*

*(b) .....*

*(9) Where an offence is committed by a firm, body corporate, trade union, employer’s organization or federation in respect of any order made under subsection (4), every partner, director, officer or official concerned shall be guilty of the offence unless they prove that –*

*a) the offence was committed without their consent or connivance; and*

*b) they exercised all due diligence to prevent the commission of the offence.*

*[Act No. 18 of 2014, Sch.]*

29. The law on contempt of court has for many years borrowed heavily from the laws of England as applied in the now repealed section 5 of the judicature Act, Chapter 8 of the Laws of Kenya.

30. In this matter, it is not in dispute that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were duly served with the order of the court dated April 2016 and varied on 27<sup>th</sup> April, 2016.

31. What is in contention is whether or not the orders of the court were capable of implementation with respect to the 1<sup>st</sup> petitioner as at the time the orders were issued, it being argued that the 1<sup>st</sup> petitioner had already been dismissed from the employ of the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent on 22<sup>nd</sup> February 2016.

32. The order of Justice Abuodha issued on 11<sup>th</sup> April 2016 reads:

*“[2] That pending the hearing of this application interpartes, the 1<sup>st</sup> respondent be ordered or compelled to refrain from dismissing, recruiting and replacing members of staff of the NGOs Coordination Board.”*

33. On 27<sup>th</sup> April 2016, upon application by the respondents, Nduma J. made the following order –

*“That the order (2) granted by Abuodha J. N. on 11<sup>th</sup> April 2016 be and is hereby varied to apply to the 1<sup>st</sup> petitioner only.”*

34. The import of the variation is clear and unequivocal that the court restrained the 1<sup>st</sup> respondent from dismissing, recruiting and replacing the 1<sup>st</sup> petitioner Shebby Sakwa from the NGOs Coordination Board.

35. Annexure ‘LNO 9’ to the replying affidavit of the respondents, is a letter dated 22<sup>nd</sup> February 2016 titled “Summary Dismissal for Gross Misconduct” addressed to the 1<sup>st</sup> petitioner by the 1<sup>st</sup> respondent. The letter partly reads;

*“This is to notify you that you have been summarily dismissed from the employment of the NGOs Co-ordination Board with immediate effect noting your aforementioned offences and failure to attend a disciplinary hearing.”*

36. As at the time the petition was filed on 5<sup>th</sup> February 2016, the 1<sup>st</sup> petitioner was still in employment of the 2<sup>nd</sup> respondent. However, the 1<sup>st</sup> petitioner was summarily dismissed from employment on 22<sup>nd</sup> February 2016.

37. The application granted by Abuodha J. was filed on 8<sup>th</sup> April 2016 and was placed before Abuodha J. in chambers, in the absence of the counsel for the applicant on 11<sup>th</sup> April 2016, when the Judge granted the order of the same date.

38. The said application is supported by an affidavit of the 1<sup>st</sup> petitioner sworn on 7<sup>th</sup> April 2016 in which, she depones;

*“4. I have been an employee of the NGOs COORDINATION Board for the past 13 years as an administration assistant.”*

*6. On 31<sup>st</sup> March 2016 I received a letter dated 22<sup>nd</sup> February 2016 informing me that I had been summarily dismissed for gross misconduct (attached hereto and marked ‘srs1’ is a copy of the letter)”*

39. Clearly, the order given by the Abuodha J. on 11<sup>th</sup> April 2016 ordering or compelling the 1<sup>st</sup> respondent to refrain from dismissing, recruiting and replacing members of staff of the NGOs Coordination Board, was incapable of implementation with respect to the 1<sup>st</sup> petitioner.

40. It is also evident that the 1<sup>st</sup> petitioner obtained the variation of the order on 27<sup>th</sup> April 2016 by Nduma J. under the misconception that the 1<sup>st</sup> petitioner was still an employee of the Board as at the time, she obtained the order by Abuodha J. and the intention was now to limit the ambit of the order to the protection from dismissal and replacement, the petitioner as opposed to all other employees of the Board.

41. The initial order and the subsequent variation were clearly issued in vain with regard to the 1<sup>st</sup> petitioner. She was no longer an employee of the Board and the two orders of the court were incapable of reinstating her to her previous position.

42. The court received very able submissions from Advocate Victor Kamau for the Amicus Curiae on the noble role played by the law on contempt whose relevance is not diminished by the facts of this case.

43. The court, like all other superior courts has the power to punish for contempt of court which is defined by Black’s Law Dictionary (Ninth Edition) as:

*“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”*

44. The court was further referred to the case of **Johnson Vs. Grant, 1923 5 SC 789 at 790**, where Lord president Clyde stated that –

*“The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.”*

45. Amicus, emphasized the need to safeguard the rule of law which is fundamental in the administration of justice and noted the recent trend in this country, where holders of high offices in the public sector had regularly failed to implement court orders, a trend that needed to be stemmed to stop the country sliding to disorder and anarchy.

46. The court appreciates greatly, submissions by counsel in this regard as a good guide to all who cherish good order and the rule of law for the prosperity of nations.

47. Having said that, this application lacks merit for the aforesaid reasons and is dismissed with costs in the cause.

**Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of September 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**