



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 92 OF 2016

(Before D. K. N. Marete)

ELPA JOHN ESEKON.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF TURKANA.....1ST RESPONDENT

EKUTAN WON YANG PAUL.....2ND RESPONDENT

RULING

This is an application by way of Notice of Motion dated 14th December, 2016 seeking orders as follows;

- 1. This application be and is hereby certified as urgent and it served be and is hereby dispense within the first instance.*
- 2. The respondent herein in particular MR. EKUTAN WON YAN PAUL is hereby ordered to attend court and show cause as to why he should not be committed to civil jail for a period of 2 years and his properties to be ascertained and attached for being in disobedience and/or breach of court orders given on 6th day of June 2016 and issued on 7th day of June 2016.*
- 3. In default the respondent herein MR. EKUTAN PAUL WON YANG PAUL to attend court as per paragraph 2 above, warrant of arrest do issue against the said respondent herein MR. EKUTAN PAUL WON YAN PAUL to be executed by the O.C.S Lodwar Police station and have him brought to court immediately.*
- 4. Upon prayer 2 and/or 3 above being made and executed this Honourable court is hereby pleased to declare that the respondent herein in particular MR. EKUTAN PAUL WON YANG PAUL is in contempt of court order given on 6th June 2016 and issued on 7th June 2016 and subsequently do order that he be committed to civil jail for a period of 2 years and/or his properties and to be attached forthwith.*
- 5. The cost be in cause.*

It is grounded as follows;

- 1. The claimant/applicant herein instituted this suit seeking the injunction orders and specific*

performance orders against the respondent herein in respect to operation of Lodwar Water and Sanitation Company (LOWASCO)

- 2. The Honourable court subsequently made orders on 6.6.2016 which were issued on 7.6.2016.*
- 3. The respondents were duly served with orders issued on 7.6.2016 and they acknowledge receipt by stamping and signing on the face of the principal copy.*
- 4. The respondent and in particular MR. EKUTAN WONNYAN PAUL has disobeyed the orders herein.*
- 5. The respondent's action amounts to contempt of court.*
- 6. The actions of the respondents are intended to belittle and undermine the courts judicial authority and the rule of law.*
- 7. The instant applications is made in good faith and in the interest of justice.*

The Respondents in their Replying Affidavit sworn on 18th January, 2017 oppose the application for being frivolous, vexatious and an abuse of the process of court and therefore should be dismissed with costs. It is their further averment that they have always been willing to prosecute their cause.

The Claimant/Applicants other case is that the respondents are in contempt of court through disobedience of this court orders made on 17th May, 2016 as follows;

- a) THAT an order of specific performance be and is hereby issued against the Respondent compelling them to re-open the office of the Applicant/Claimant and allow the Claimant access his office freely without any restrictions whatsoever pending hearing and determination of the main suit.*
- b) THAT the honourable court be and is hereby pleased to issue temporary injunction restraining the Respondents herein by themselves, and any other person acting on their behalf from interfering with smooth running of Lodwar Water and Sanitation Company (LOWASCO) which is a company duly registered under the Companies Act Cap 486 pending hearing and determination of the main suit.*
- c) THAT the respondents do bear costs of this application.*

It is Claimant/Applicant's further submission that the above orders of court were served on to the 2nd Respondent through his secretary on 14th June, 2017 but despite this, he has continued to act against the said orders as follows;

- a) The court order was served on 14/6/2016 to the secretary of the 2nd Respondent and was acknowledged vide a return of service affidavit sworn by Nahsone W. Ongayo. Nahsone is an authorized process server, who is conversant with the office of the 2nd Respondent having served the earlier order of 19th May, 2016.*
- b) Perusing the principal copy of the order it is clear that it was stamped and signed by the secretary of the Respondent.*
- c) The advocated of the 2nd Respondent acknowledge service of the orders in paragraphs 4 and 5 of the Certificate of Urgency dated 6th July, 2016.*
- d) The Notice of Motion on the same date by the advocates of the 2nd Respondent prays for review/setting aside of the orders issued on 6th June, 2016.*

e) *The Supporting Affidavit sworn by the County Secretary on behalf of the 2nd Respondent on 6th July, 2016 in paragraphs 5 and 6 admits service of the order of 6th June, 2016.*

f) *The letters forming the basis of all the submissions of the Respondents were written by the 2nd Respondent and he cannot therefore say that he was not aware of the orders of 6th June, 2016.*

Further, the 2nd Respondent continued to defy and disobey the court order as follows;

a) *He did not reopen or cause to be reopened the door of the office of the claimant. He did not also surrender the 2 keys he took away.*

b) *The 2nd Respondent continued to issue instructions and guidance to the Technical Services Manager and the Financial Accountant making them not to report to the Claimant. This amounted to interference.*

c) *That after the Applicant made minor redeployments in LOWASCO to correct deteriorating services and work discipline the 2nd Respondent issued verbal instructions to the same employees cancelling the Applicant's deployments in August, 2016.*

The 2nd Respondent posted negative comments in the social media in October, 2016 against the management of the Applicant with the aim of inciting the public and the employees against the Claimant.

d) *The 2nd Respondent is said to have written to remove the name of the Applicant as a mandatory signatory to the LOWASCO accounts. This amounted to interference with the Applicant's function of controlling LOWASCO commercial and financial functions. The 2nd Respondent has since made all efforts to block confirmation of his actions.*

He seeks to buttress his case by relying on the authority of **Kenya Tea Growers Association Versus Francis Atwoli & 5 Others, Petition Number 64 of 2010** where the court held as follows;

"In the case before me, I am more that satisfied that even at higher level of beyond reasonable doubt, when an individual has been and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decisions to determine when the strike should end despite the fact that the court order had stopped it.....his contempt was obvious and his conduct and words attract no other finding."

The 2nd Respondent in his written submissions dated 24th March, 2017 opposes the application and cites three issues for determination as follows;

?Whether service of the Court Orders in question was done as required; and

?Whether, regardless of the finding on the question of service, the 2nd Respondent can be said to have failed to comply with the subject court Orders; and

?Whether the sanctions sought by the Claimant have basis in law.

It is the respondent's submissions that indeed there is no evidence of service on his part and the claimant/applicant's part version as expressed in the return of service by Nahshone W. Ongayo is unclear on this. Further, the claimants evidence of service is tainted with half truths and blatant lies thus making it unreliable for a case of contempt of court which requires proof beyond a balance of probabilities and towards beyond reasonable doubt. He further seeks to distinguish the case for contempt in the **Francis Atwoli** matter aforesaid as follows;

In the instant case, the Claimant is full of rumours, hearsay and conjecture but short on evidence as would enable this Honourable Court arrive at a just resolution of this matter. As Winston Churchill would put it, the Claimant has stumbled upon the truth, but unfortunately has hastily picked himself up and hurried on as if nothing had happened.

The respondent's other case is that at no one time has he failed to comply with court orders and further that the remedies sought by the applicant have no basis in law. This is because the claimant prays for imprisonment of the contemnor for a period of two years and or attachment of property whereas it is trite law that contempt of court as outlined in the penal notice provides for imprisonment for a term not exceeding six (6) months. This is exemplified in other authorities on the issue of contempt where she posits as follows;

*It is remarkable that none of the authorities cited by the Claimant support his prayer in terms of imprisonment for a term of 2 years and or attachment of property: In **Teachers Service Commission vs. Kenya National Union of Teachers and 2 others (2013) eKLR** both contemnors being Wilson Sossion and Mudzo Nizili were each fined an amount of Kshs.500,000/= or in default be committed to civil jail for 30 days. In **Africa Management Communication International Limited vs. Joseph Mathenge Thuo and 1 other (2013) eKLR** the contemnor was jailed for 30 days without option or a fine.*

Again, in **Felistus Muliro Nanjala vs. Robert Koech and 2 Others (2016) eKLR** where Ombwayo, J. on a finding of a *serious contempt of the court* ordered a punishment of a 30-day jail term or in the alternative, a fine of Kshs.100,000.00. I agree.

The respondent's case overwhelms that of the applicant. This is because in cases of contempt of court strict compliance with the rules of procedure must be had. This is more so bearing in mind that contempt proceedings are *quasi* criminal in nature and intent. Evidence of service: that the contemnor was always alerted of the court orders claim to have been disobeyed must be foremost and frontal. A clear demonstration of this must be had by the applicant. This being absent in the circumstances of this case, the application must inevitably fail.

Again, the frame of the application and the relief sought outrightly contradicts basic tenets of a case of contempt of court. Its sentence being *quasi* criminal attracts punishment which would infringe on the liberty of the contemnor and therefore the clear requirements as to procedure and form in an application for contempt of court.

I am therefore inclined to dismiss the application with orders that each party bears their own cost of the application.

Delivered, dated and signed this 15th day of November 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kiboi instructed by Kiboi Tuwai & Company Advocate for the claimant/applicant.
2. Mr. Omulama instructed by Rachier & Amollo Advocates for the 2nd respondent