REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

OF KENYA AT NAIROBI

PETITION NO. 55 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 23rd June, 2016)

JOHNSON OTIENO ADERA.....1ST PETITIONER

ABDIKADIR MOHAMED.....2ND PETITIONER

WELDON KIPROTICH SIGEI.....3RD PETITIONER

SAMMY AREKAI SARICH.....4TH PETITIONER

VERSUS

THE ANT-COUNTERFEIT AGENCY.....1ST RESPONDENT

JOHN AKOTEN.....2ND RESPONDENT

MICHAEL AREMON.....3RD RESPONDENT

POLICAP IGATHE.....4TH RESPONDENT

RULING

1. The Application before the Court is an Application for orders for contempt of Court filed by a Notice of Motion dated 27th August 2015 brought under the Inherent Jurisdiction of the Court and Rule 27 (1) (g) of the Industrial Court Procedure Rules, 2010, where the Applicant seeks orders that:

> *1.* ***The Court do find that the Anti-Counterfeit Agency, John Ebenyo Akoten and Michael Ekai Aremon are in contempt of Court for disobedience of the orders of this Court issued on 21st Atust 2015.***
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> *2.* ***Upon the grant of prayer (3) above the Court do impose a penalty of a fine of Kshs.10,000,000 (Kenya Shillings Ten Million) against the Anti-Counterfeit Agency and in default of payment of such fine, all movable and immovable assets of the first Respondent including furniture and motor vehicles be attached and sold in execution of this order to satisfy the penalty for contempt.***
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> *3.* ***Upon the grant of prayer (3) above the Court do issue an order that Mr. John Ebenyo Akoten***

and Mr. Michael Ekai Aremon be fined Kshs.3,000,000 (Kenya Shillings Three Million) each in default they be committed to civil jail for a period of 6 months.

4. ***The Court be pleased to issue an order restraining or prohibiting the Anti-Counterfeit Agency and specifically Mr. John Ebenyo Akoten and Mr. Michael Ekai Aremon from in any way interfering, undermining, and frustrating the Applicants in the official conduct of their official duties including but not limited to ill-intentioned letters, internal memos, and or e-emails in furtherance of undermining this Honourable Court Orders.***

5. ***The Anti-Counterfeit Agency, Mr. John Ebenyo Akoten and Mr. Michael Ekai Aremon do meet the costs of this application.***

a. ***Any other or further orders of the Court geared towards protecting the dignity and authority of the Court.***

2. The Application is supported by the following grounds on the face of the Motion and the annexed affidavit of John Otieno Adera that:

1. ***This Honourable Court delivered its ruling which was extracted on the 21st of August 2015 and was served upon and acknowledged by the Respondent in a letter dated 26th August 2015. That this order was blatantly disobeyed by the Respondent.***

2. ***The Court order was clear and explicit that the improperly constituted board is null and void given that the resolution to send the Applicants on compulsory leave was reached at that said meeting, the Court found the resolution null and void for lack of quorum and set aside the said resolutions, the compulsory letters of leave were also declared null and void.***

3. ***From their letter dated the 26th of August 2015, the Respondents have shown that they have no regard for the order issued by this Honourable Court as they have expressly defied, ignored and disregarded and instead made their own terms.***

4. ***The Honourable Court also ordered that information be given under Article 35 of the Constitution of Kenya to the Applicants in terms of prayer No. 4 of the Application dated 19th June 2015, which information they have neglected to provide, and that the order do remain in force pending the hearing and determination of the Petition.***

5. ***The Court order bore a notice of penal consequences but the Respondents disregarded that Court order.***

6. ***The Applicants are apprehensive that the rule of law is under threat by the Respondents who have vowed to continue defying the same at will.***

3. The Respondents oppose the Notice of Motion Application by the Applicant dated 27th August on the following grounds:

1. ***That the application is ripe for striking out with costs as it is fundamentally flawed and ill-conceived, it fails to meet the essential preceding for grant of committal or attachment orders for contempt of Court.***

2. ***The Applicants electively and cunningly extracted orders of the Court deliberately acting in contravention to the provisions of the law as provided under the Civil Procedure Rules, Order 21 Rule 7.***

3. ***That the above orders arose from a Ruling delivered on the 20th of August 2015 by Hon. Justice Wasilwa in an Application brought by the Applicants herein dated 19th June 2015.***

4. ***The Respondents have procedurally filed a formal application under Certificate of Urgency dated 27th August 2015 to set aside the erroneously extracted orders and for the stay of execution and proceedings in the said suit and which application is scheduled for hearing on the 16th October 2015.***

5. ***The Respondents have filed a Notice of Appeal for the Ruling dated 25th August 2015, but has not defied the Honourable Court's Orders as alleged by the Applicant.***

6. ***The Respondents are displeased with the finding that the Board sitting was found not proper and the question on quorum thereof would be a substantive issue in the hearing of the Petition and not an interlocutory issue.***

7. ***The letter dated 26th August 2015 is unequivocal in allowing the Applicants back to work, and as to information, the Applicants have procured orders before Hon. Mbaru in ELRC JR Application No. 10 of 2015 – Republic vs. Anti-counterfeit Agency ex-parte Johnson Otieno Adera and 3 others effectively stopping the release of the information to them.***

8. The Application lacks merit and is an abuse of the Court process as it does not meet the stipulated threshold to warrant orders as prayed for alleged contempt of Court thus should be struck out with costs.

4. The parties all made oral submissions in Court on the matter.

5. The gist of the Applicants argument was that they received the orders where compulsory leave was declared null and void, and that the board resolution of the constituted board was also null and void for lack of quorum. The said order was served on the Respondents on the 26th of August 2015 but they continued to give effect to the resolutions of the Board of Directors and have obstructed the Petitioners from operating as they were before the compulsory leave was issued.

6. Moreover, they are yet to supply the Applicants with the information which to date is yet to be provided. They rely on the case of **Prof. Mwaniki Silas Ngari vs. John Akama & Dr. Eng. S. Mwarania** where at paragraph 38 the Court of Appeal in referring to the case of **Justice Kariuki Mate & Another vs. Martin Nyaga Wambora (2014) eKLR** states that:

"The trial Court was correct in holding that the law as was in contempt of Court has changed. The law as it stands today is that knowledge of Court order is sufficient for purposes of contempt proceedings".

7. In the same case, at paragraph 63, the Court refers to the case of **Johnson vs. Grant 1923** SC 789 at 790 Lord President Clyde stated:

"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".

8. Further, in paragraph 64, in the case of the **Teachers Service Commission vs. Kenya National Union of Teachers and 2 Others (2013) eLKR** Justice Ndolo alluded to the same position and cited that Johnson case (supra) by stating:

"A Court order is not a mere suggestion or an opinion or a point view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the Court, the avenues of challenging it are also set out in the law. Defiance is not an option".

9. In response, the Respondents confirmed that they did indeed receive the Court order and acted in full compliance of it. They state that the current application only presents two acts of alleged defiance, that is, issuance of letter and failure to avail information.

10. They submit that there is an order in palace by the Hon. Justice Mbaru barring the Respondent from corresponding with the Applicant as regards the information.

11. They submit that they are not in contempt of the Court and further urge the Court to look at paragraph 36 of the **Prof Mwaniki Silas Ngari** case where the learned Judge reiterated the contents of Rule 81.10 of the Civil Procedure Amendment No. 2 Rule 22 of England which states that:

> ***(3) The Application Notice must:***
>
> ***"Set out in full the grounds on which the committal application is made and must identify separately and numerically each alleged act of contempt including if known the date of each of the alleged acts and***
>
> ***(b) be supported by one or more affidavits containing all the evidence relied upon.***
>
> ***(4) subject to paragraph (5) the application notice and evidence in support must be served on the Respondent.***
>
> ***(5) the Court may:***
>
> ***(a) Dispense with the service under paragraph (4) if it is considered it is just to do so.***
>
> ***(b) make an order in respect of service by an alternative method or at an alternative place.***
>
> ***……..".***

12. They further state that the Applicants were allowed back in the office and continued with full benefits and entitlements and that they complied with the Court order.

13. They submit that the extracted order was materially flawed and a misrepresentation of the Court order, moreover, the Applicants are also in apprehension of facts.

14. In response the Applicants reiterate that they were never welcomed back and emphasize the actions of the Respondent through Mr. Aremon and Mr. Akoten where they referred to the order as a mere piece of paper and continued to act with impunity are examples of such defiance.

15. They pray that the application be allowed.

16. Having considered the submissions of both parties, there are 2 issues for consideration:

> *1.* ***Whether the Respondents had knowledge of the Court Order purportedly disregarded by them.***
>
> *2.* ***Whether the Respondents have committed any act or omission in disregard of the Court order.***

17. On the 1st issue, the Respondents have conceded that they received the Court Order in question but insist they have not done anything in contravention thereof. That being the position, the next issue to consider is whether the Respondents have done/or not done any act contravening the Court Orders.

The order of this Court on 20/8/2015 was as follows:

> *1.* ***"That improperly constituted board is null and void and given that the resolution to send the Applicants on compulsory leave was reached at this meeting, this Court finds the resolution null***

and void for lack of quorum and is therefore set aside.

2. ***That the Respondents to provide the Petitioners with information under Article 35 of the Constitution of Kenya of the said complainants and the general public and the manufacturers/IPR owners as contained in the letter dated 15th June, 2015 which include correspondences, and mails.***

3. ***That the compulsory leave letters are hereby declared null and void.***

4. ***That the order do remain in force pending the hearing and determination of this Petition".***

19. The Applicants content that the Respondents, in contravention to the above orders wrote to the Applicant on 26th of August 2015.

20. The Applicants aver that the Respondents having been declared null and void for want of quorum could not have transacted any legal business on 12th June 2015 to approve any transactions. They aver that any orders made by the illegally constituted board could not be binding on the Applicant.

21. I agree with this submission. I declared the board not properly constituted on 20/8/2015. The communication in the letter of 26th August 2015 seems to ignore this position though communicating on decision made on 12th June 2015.

22. The other contention by the Applicants is that this Court had declared the resolution to send the Applicant on compulsory leave by this board null and void. The important of this ruling was that the Applicant was to revert to his position and any changes made affecting his position were null and void. The Respondents seem to ignore this position in their letter of 26th August 2015.

23. This Court also directed that the Respondents supply certain information to the Applicant. The Respondents avers that they didn't do so because they have an order in JR 10/15 stopping release of any information to the Applicant.

24. What the Respondent failed to do however was to attach the said order for this Court to see and understand its implications. That notwithstanding, there are no orders brought to this Court's attention contrary to the orders this Court gave.

25. The orders emanating from a different file even if available would not in my view stay the orders of this Court in the current file unless they expressly state so.

26. I therefore find as stated in the case of **Prof. Mwaniki Silas Ngari** that indeed the dignity of the Court should be protected and there is no room to disobey the Court's orders or even behave in a manner to suggest that the orders are not necessary.

27. I find that the Respondents and in particular Michael Ekai Aremon the author of the letter of 26th August 2015 and 3rd Respondent are in contempt of this Court and do find so and therefore find that they should be punished for contempt of these Court's orders.

Read in open Court this 23rd day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mwathare holding brief for Luci Respondent – Present

No appearance for the Claimant