



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 25 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 13th June 2016)

STEPHEN CHASE KISAKA.....CLAIMANT

VERSUS

EMIRATES AIRLINE LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The Notice of Motion Application before Court is one dated 9.09.2015, brought under Section 5 (1) of the Judicature Act Cap 8 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, the inherent jurisdiction of the Court, and all other enabling provisions of the law, where the Applicant seeks the following Orders:

- 1. An Order of committal to be made against Ms. Anita Kongson, the Country Manager/ Area Manager of the Respondent, to prison for such period as this Honourable Court may deem fit and just.***
- 2. An Order of attachment of the Respondent's property for such period of time until the contempt is purged.***
- 3. An Order that the costs of these contempt proceedings be borne by the Respondent.***

2. The Application is premised on the grounds that:

- 1. The Respondent was on 12 March 2015, restrained by this honourable Court from advertising, recruiting and or in any way filling up the position of Sales Manager Kenya pending hearing and determination of the matter.***
- 2. The Respondent despite having been served with this Court's said Order on two different occasions, has nevertheless re-designated the Applicant's job and advertised it in contravention to the said order.***
- 3. The Respondent persists in its refusal and neglect to respect this Court's Order.***

3. The Application is supported by the Affidavit of Stephen Chase Kisaka, the Applicant herein wherein he states that, he approached Court vide a Notice of Motion Application dated 14th January, 2015,

whereby Orders were issued on 12.3.2015, restraining the Respondent from recruiting, employing or in any way whatsoever filling the position of Sales Manager. The Order was annexed to the Application as SCK – 17.

4. He states that the Order was served on the Respondent's Advocates and the Respondent's Country Manager one Anita Kongson, on the basis of which the Respondent filed a notice of appeal and included it in a Record of Appeal filed at the Court of Appeal. A copy of the notice of Appeal is annexed to the application as SCK – 18.

5. That on 4th August, 2015, the Applicant learnt that the Respondent had advertised for his job in outright contravention of the Court's Orders. The Respondent rebranded his position of Sales Manager Grade 9 to District Manager and advertised it. The advertisement was annexed to the application as SCK 20.

6. The Applicant contends that on learning that the Respondent had begun recruitment for the position he was holding he once again caused service to be effected on Anita Kongson in person who neglected or failed to abide by it as the advertisement was not cancelled.

7. It is for the aforesaid reasons that the Applicant prays that this application be allowed.

8. The Respondent filed grounds of opposition and two replying affidavits on 11th November, 2015, one by Anita Kongson and the other by Carolanne Groves. In the Grounds of opposition they state that the Application is an abuse of the process of the Court. That the Order alleged to have been violated was never served on the person sought to be committed nor was a penal notice served and as such the application is untenable. The Respondent is also of the view that the Application does not disclose any cause of action in respect of contempt of Court.

9. In the Replying affidavit of Ms. Anita Kongson the Country Manager of the Respondent who avers that she has never been personally served with the Court Order and as such the Application fails the test of the elaborate procedural law governing the institution and prosecution of contempt proceedings. She prays that the Application be dismissed with costs.

10. In the Replying Affidavit by Carolanne Groves, she states that she is the Human Resource, Business Support International Manager of the Respondent Airline. She states that as the obligation of hiring which includes advertisement up to and including the recruitment phase over which the Country Managers and in this instance Ms. Anita Kongson has no mandate, authority and/or control over.

11. She admits that the Respondent has all along been aware of the existence of the Court Order and they have at all times from inception of the said Order abided by the terms of the same.

12. She further avers that no advertisement has been published by the Respondent in breach of the Court Order and if at all there is any advertisement relating to the Sales Manager position the same was published prior to the Court Order being issued. She prays for the application to be dismissed with costs.

13. The Parties filed submissions on the Application and the Court's power to deal with contempt of Court is provided for under Section 5 of the Judicature Act Cap 8 Laws of Kenya and Rule 3 (1) of Order 40 of the Civil Procedure Rules 2010.

14. The Applicant submits that the action of the Respondent of re-designating the position of Sales Manager Kenya as District Manager amounts to a mere rebranding as the job descriptions and obligations for the two positions are identical and as such a violation of the Court Order of 12.3.2015. For this reason the Applicant seeks that the Respondent be found liable for contempt of Country Manager.

15. It is the Applicant's contention that the Respondent's had a duty to comply with the Court Order of 12.3.2015. He cites the case of **Shimmers Plaza Limited vs. National Bank of Kenya Limited (2015) eKLR** where it was stated that :

“It cannot be gainsaid that the duty to obey the law by all individuals and institutions is paramount in the maintenance of the rule of law, good order and the due administration of justice.”

16. The Applicant submits that Ms. Anita Kongson as the Country Area Manager has a duty to obey the Court Order of 12.3.2015 on the Respondent’s behalf. She out rightly failed to honour the Court Order and proceeded to advertise for the Applicant’s position. The Applicant refers to the case of **Faza Holdings Limited t/a Down Town Hotel Vs John Kagonye Ngururi & another (2014) eKLR** where the Court held that *“a Court Order must be obeyed until or unless it is stayed or set aside”*.

17. Ms. Anita Kongson in her affidavit states that she was never personally served with the Court Order however it is admitted that the Respondent was at all material times aware of existence of the Order.

18. The Applicant states that the said Ms. Kongson was aware of existence of the order which is sufficient to hold her in contempt. He relies on the case of **Kenya Tea Growers Association vs. Francis Atwoli & 5 Others (2012) eKLR**; where the Court held that the threshold for contempt is met if an individual is served or has knowledge of a Court Order. In the instant case it is submitted that the Respondent’s representative Ms. Kongson had knowledge of existence of the Order.

19. As to procedural requirements for contempt of Court application being met, the Applicant submits that notice to the state is not necessary as was held in the case of **Sam Nyamweya & 3 others Vs Kenya Premier League Limited & 2 other (2015) eKLR**.

20. The Applicant prays for the application to be allowed as drawn.

21. The Respondent in submissions states that the application does not meet the procedural requirement of notice to the state and personal service on the alleged contemnor as set out in Order 52 Rule 2 of the Supreme Court Rules. They also refer to the case of **Republic vs. County Council of Nakuru Ex-parte Edward Aleta t/a Genesis Reliable Equipment & 2 Others (2011) eKLR** to buttress this position.

22. They also state that the Application must fail for lack of personal service on the intended contemnor. They refer to the case of **Alvine Kamande Vs Esther Njeri Njenga & 5 Others (2014) eKLR**.

23. The Respondent further states that they have never disobeyed the Court Order complained of as they never put up any advertisement for the Applicant’s position as to amount to constructive replacement. They state that there is no Court Order breached and as such the application must fail.

24. Having considered the submissions of both parties, I set issues for determination as follows:

- 1. Whether the Respondents were aware of the Court Order dated 12.3.2015.***
- 2. Whether there were any acts of contempt committed by the Respondent.***
- 3. If so, if the said acts are punishable.***

25. On 12.3.2015, this Court made an order in the following terms:

“(1). That this application be certified urgent and heard ex parte in the first instance.

(2). That pending interparties hearing and determination of this application, the Respondent by itself its agents, servants and or employees be restrained from advertising, recruiting and or in any way filing up the position of Sales Manager Kenya.

(3). That pending the hearing and determination of this Claim, the Respondent by itself its agents, servants and or employees be restrained from advertising, recruiting and/or in any way filing up the position of Sales Manager Kenya.

(4). That the case be set down for hearing on a priority basis.”

26. The Applicant avers that the order was served on the Respondents. The Country Manager of the Responder in her replying affidavit avers that she was never served with the Court Order but the Respondents HR, Business Support International Manager- Carolanne Groves states that the Respondent has all along been aware of the existence of the Court Order and done all things to abide by it.

27. The 2 affidavits sworn by the Respondents seem to be contradictory as the HR Manager states that the Respondents were all along aware of the Court Order and the Country Director being in charge of the Respondents activities in Kenya must have been aware of the said Court Order.

28. I have restated the law on service in contempt proceedings over and over again. In the case of **Prof. Mwaniki Silas Ngari vs. Prof. John S. Akama and Another Cause No. ELRC Nairobi 1380/2013**, I cited **Justice Kariuki Mate & Another vs. Martin Nyaga Wambora (2014) eKLR** where the learned JJA cited Rue 81.10 of the Civil Procedure (Amendment No. 2) Rule 2012 of England which states as follows:-

“5. The Court may:

a. Dispense with service under paragraph (4) if it considers it just to do so or

b. Make an order in respect of service e by an alternative place”.

29. The Court of Appeal further restated the rule 18.8 and stated circumstances under which the Court can dispense with personal service of an order as follows:

“in the case of judgment or an order requiring a person not to do an act the Court may dispense with service of a copy of the judgment or order in accordance with Rules 81.5 and 81.7 if it is satisfied that the person had notice of it:

1. By being present when the judgment or order was given or made.

2. By being notified of the service by telephone, email or otherwise”.

30. In this case, the Respondents HR Manager has stated the Respondents were all along aware of the existence of the Order in question and the averment by the Respondents Country Manger that she was not personally served will not hold any water given that her origination was aware of the existence of this order.

31. This Order was also given in Court on 12/3/2015 after interpartes hearing of the application. On 19/2/2015 and 12/3/2015 allocated by Court as the date for the Ruling in the presence of the Respondents Advocates.

32. This Court therefore finds that the Respondents were aware of the existence of this Court Order whether personally served or not.

33. On second issue, the question is whether the Respondents did any act or omission in contempt of the Court Order. The Order of the Court forbade advertisement on filing of the position of Sales Manager Kenya.

34. The Applicant avers that infact the Respondents have gone ahead and advertised for this job which the Respondents deny. At the time, the Applicant was employed he was recruited pursuant to the advertisement Appendix 20 which outlined the duties for the job. The job description outlined is as follows:

- ***To achieve, organize, control and monitor passenger sales targets and marketing goals of***

the company.

- *To monitor operations and administration of sales in line with company procedures and policies.*
- *To assist in the development of value-added produces for implementation in the local market in order to further optimize and enhance revenue.*
- *To control, guide and monitor the day-to-day activities of all filed sales staff to ensure satisfactory performance levels and smooth flow of business.*
- *To ensure that the produce and promotional plans are understood and implemented to give the greatest impact in the market.*
- *To prepare weekly, monthly and annual sales reports and constant monitoring of market trends and competitor activities in order to ensure that head Office is kept informed of local conditions.*
- *To review the fortnightly and monthly sales of travel agents and GSA to ensure that business potential is being maximized and take suitable remedial actions.*
- *To liaise with marketing and tariff units and other passenger service related departments of Emirates to ensure well integrated sales effort.*

35. The Applicant avers that the advertisement Appendix 19 for the District Manager is the same as that for which Applicant was employed save for changing the title to read District Manager. The duties of this post are as follows:

- *“Reporting to the Area Manager you will be responsible for planning; directing and leading all aspects of the business in ensure that country revenue targets; as part of the overall region targets; are achieved or exceeded; whilst ensuring a high degree of customer satisfaction.*
- *In close liaison with Area Manager, you will be required to develop and execute the sales strategy. Achieve sales/revenue targets and marketing goals in the region; including control; guide and monitor the day-to-day activities of all filed sales staff to ensure satisfactory performance levels and smooth flow of business.*
- *Be the primary spokesperson and ensure that Emirates portrays a positive image in the country. Represent Emirates at industry forums and protect the Company’s interests at such forums to ensure that the brand image of the Company is held at the highest level of professionalism. Manage and maintain relationships with key political representatives; state government departments and regulatory authorities within Kenya.*
- *Work with the PR and Advertising teams to best target and coordinate those activities within the region. Ensure that produce and promotional plans are understood and implemented to given the greatest impact in the market.*
- *Conduct regional meetings to provide a forum for local issues to be managed and where required; escalate issues with wider impact to the functional manager.*
- *Liaise with HR to recruit, train and develop staff so that they can provide the highest possible sales and passenger handling services.*
- *Liaise with the Finance and Admin Manager in regards to the management of Company assets; offices; IT maintenance/discrepancy/change required and ensure that the country*

operates within budget. Collaborate with the Finance team to ensure that Company's financial interests are protected in the region.

- *By delivering a seamless produce through the effective management of diverse business areas; ensure customers are satisfied with all the Company services and facilities offered in the country.*
- *Monitor route profitability and suggest ways of improvement. Evaluate and identify potential markets with a view to expanding the business in the country.*
- *Maintain overall administrative and budgetary control of the country; in addition to providing direction for each department to ensure integrated customer service in accordance with service standards. Line Managers will indirectly report to the District Manager in order to ensure an operation that focuses on the overall objective of the organization. For functional/operational issues the line managers will continue to report to their respective direct line manager in Dubai.*

36. Both adverts are in the Department EBK 10- however, the Applicant had been employed on position EK 08 and the one advertised is on job Group EK 09. Whereas the Applicant insists that the position advertised is the one this Court stopped, I find material differences in the position the Applicant was employed in and the position advertised.

37. The Applicant was employed as Sales Manager and position advertised is for District Manager. The job descriptions of the two posts are also substantially different.

38. It is my finding that the allegations that the Respondents have advertised for position held by Applicant previously as a constructive replacement is not demonstrated by the Applicant. In this case, the application for contempt must fail. As previously directed by this Court, the main Cause should be listed down for hearing on priority basis.

39. Costs in the course.

Read in open Court this 13th day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Rashid holding brief for Nasungu for Claimant

Simba for Respondent