



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 1798 OF 2015

JOYCE WANJA MWANGI.....CLAIMANT/APPLICANT

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD

NAIROBI COUNTY.....2ND RESPONDENT

ECONOMIC CREDIT TRADERS LIMITED.....3RD RESPONDENT

RULING

1. The Claimant/Applicant's notice of motion dated 4th February 2016 is what is before me. The motion expressed to be under Section 5(1) of the Judicature Act, Rule 81:4 of the England Civil Procedure Amendment No. 2 Rules 2012, Section 12 of the Industrial Act and Rule 31 of the Industrial Court (Procedure) Rules 2010 seeks the county secretary Nairobi county, the payroll officer Nairobi city county, both officers of the 1st Respondent and the credit manager of the 3rd Respondent be summoned before this Court to show cause why they should not be committed to civil jail for blatantly failing to comply with orders issued by this honourable Court on 9th October 2015 and 5th November 2015. In addition, the motion sought the committal to civil jail for 6 months should they fail to show cause why they should not be committed and that the Respondents be barred from addressing the Court until they purge the contempt. The application was premised on grounds on the face of it as well as the affidavit of the Claimant sworn in support of the motion on 4th February 2016.
2. The advocates for the 3rd Respondent filed a preliminary objection on 4th February 2016 to effect that the Court lacks jurisdiction to hear the dispute between the Claimant and the 3rd Respondent and subsequently filed grounds in opposition of the motion on 20th May 2016. In the grounds, the 3rd Respondent stated that the documents in respect of which committal was sought were already produced in Court and that there was no basis for the grant of the orders sought. The 3rd Respondent asserted that the order for committal was an abuse of the Court process and that the application sought to technically delay the case. The Respondent also asserted that the Court lacks the jurisdiction to hear and determine the dispute before it as regards the transaction between the 3rd Respondent and the Claimant.

3. Parties sought to file submissions in support and defence of the motion. The Claimant/Applicant filed her submissions on 17th June 2016 while the 3rd Respondent filed submissions on 21st June 2016. In her submissions, the Claimant submitted that the Respondents were guilty of contempt which she defined using Black's Law Dictionary (Ninth Edition). She submitted that the court had power to punish for contempt as provided for in Section 5 of the Judicature Act and Amendments to the England Civil Procedure Rules (2012). She submitted that the officers were aware of the Court orders of 9th October 2015 and 5th November 2015 and that the officers failed to comply with the Court orders. The Claimant relied on the case of **Africa Management Communication International Limited v Joseph Mathenge Mugo & Another [2013] eKLR** where the judge associated himself with the finding of Lenaola J. in the case of **Basil Criticos v Attorney General & 8 Others [2012] eKLR** and submitted that the 1st and 3rd Respondents had wilfully failed to comply with the orders of the Court. Reliance was placed on the cases of **Sam Nyamweya & 3 Others Kenya Premier League Limited & 2 Others [2015] eKLR**, **Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR**, **Teachers Service Commission v Kenya National Union of Teachers & 2 Others [2013] eKLR** and **Justus Nyaribo v Clerk Nyamira County Assembly [2013] eKLR**. The Claimant also relied on the writings of Salmon LJ in **Arlidge, Eady & Smith on Contempt, 3rd Edition**.
4. The 3rd Respondent submitted that the Claimant had not met the threshold for the grant of the orders to show cause why committal for contempt of court should not issue. The 3rd Respondent submitted that the orders sought against the 3rd Respondent were premature as no discovery had been sought and that in any event, the documents sought had been produced in Court. The 3rd Respondent submitted that the dispute was framed within the context of the Employment Act and that the Court was devoid of jurisdiction as the dispute between it and the Claimant was clearly a commercial transaction and for which the 3rd Respondent had a counterclaim. The 3rd Respondent cited the case of **National Social Security Fund Board of Trustees v Dr. Sally Kosgey & Another [2005] eKLR** which was to the effect that documents sought in discovery must be specified. The 3rd Respondent relied on the provisions of Article 50 of the Constitution and submitted that any person subject to any proceedings is entitled to the constitutional protection of a fair trial. The Respondent relied on the case of **Fresco Bushlands (K) Limited v Warsame Mohamed Isaak & 4 Others [2015] eKLR** where Angote J. held that the standard of proof in contempt proceedings must be higher than the proof on the balance of probabilities, almost but not exactly beyond reasonable doubt. The 3rd Respondent submitted that as far as the dispute between it and the Claimant goes, the Court is not clothed with jurisdiction to hear and determine the matter as under Article 162(2) and Section 12 of the Employment Act, the jurisdiction of the Court is limited to the matters set out in Section 12. The 3rd Respondent submitted that the motion should be dismissed with costs to the 3rd Respondent.
5. The application before me seeks orders of committal but the issue that has come to the fore is the determination of one key issue. Does this Court have jurisdiction to handle the claim formulated by the Claimant against the 3rd Respondent? Courts have a duty to dispose of any jurisdictional challenge at the earliest opportunity once the challenge is raised. Jurisdiction is everything. This was stated so eloquently by Nyarangi JA in the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** the *locus classicus* on jurisdiction. All the judges on the bench Nyarangi, Masime, Kwach JJA all wrote opinions but the definitive one was by the presiding judge Nyarangi JA who held as follows:-

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

6. The authority for this holding by the learned Judge of Appeal is to be found in the writings of John Beecroft Saunders in a treatise headed **Words and Phrases Legally defined – Volume 3: I – N** and which states the following about jurisdiction at page 113:-

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

7. Clearly, if I lack jurisdiction I have no option but to down my tools and take no further step. The 3rd Respondent asserts that the relationship between the Claimant and itself is purely commercial and that the Court, in light of Section 12 of the Employment & Labour Relations Act, is limited to the matters set out therein. The 3rd Respondent submitted that the Court has no jurisdiction to entertain the claim against it as there is no employee-employer relationship between it and the Claimant.
8. The Court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Employment & Labour Relations Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including disputes relating to or arising out of employment between an employer and an employee; disputes between an employer and a trade union; disputes between an employers' organisation and a trade unions organisation; disputes between trade unions; disputes between employer organisations; disputes between an employers' organisation and a trade union; disputes between a trade union and a member thereof; disputes between an employer's organisation or a federation and a member thereof; disputes concerning the registration and election of trade union officials; and disputes relating to the registration and enforcement of collective agreements. The suit before me is a collateral attack on the Claimant's employer in relation to her salary and deductions made therefrom. I cannot assume jurisdiction where the law has created competent authorities to deal with the issues before me. In my considered view, this is a suit competent for the High Court in the Commercial Division. Clearly, there is no jurisdiction to entertain a strictly commercial transaction between one party to whom I could exercise jurisdiction in respect to the employment issues she has with the 1st and 2nd Respondent. I therefore decline to hear the dispute between the Claimant and the 3rd Respondent and strike out the 3rd Respondent's name from this suit. I make no orders as to costs.
9. The Claimant seeks committal against the two named officers of the 1st Respondent. The 2 officers are alleged to have wilfully disobeyed valid Court orders issued on 9th October 2015 and 5th November 2015. The Claimant unfortunately did not raise the bar to meet the requirement of the law. In the case of **Fresco Bushlands (K) Limited v Warsame Mohamed Isaak & 4 Others [2015] eKLR** my brother Angote J. held that the standard of proof in contempt proceedings must be higher than the proof on the balance of probabilities, almost but not exactly beyond reasonable doubt. In this case, the Claimant was duty bound to show that the 2 officers of the 1st Respondent had disobeyed the Court order and in order to demonstrate the disobedience, some element of evidence or proof was required. The payslip or pay advice showing the deductions made would have aided the Court in making the determination as to whether grounds to show cause and

subsequent committal exist.

10. The upshot of the foregoing is that in my considered view the Claimant woefully failed to discharge her burden. The only order that commends itself for me to make is that the orders sought are not fit to be granted and the motion fails. As the 1st Respondent did not participate in the motion I will make no order as to costs. Application dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of July 2016

Nzioki wa Makau

JUDGE