



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**OF KENYA AT NAIROBI**  
**PETITION NO. 90 OF 2016**

(Before Hon. Lady Justice Hellen S. Wasilwa on 29<sup>th</sup> September, 2016)

**JOSEPHINE MUENI MUTUNGA.....PETITIONER/APPLICANT**

**VERSUS**

**ENERGY REGULATORY COMMISSION.....RESPONDENT**

**ENG. JOSEPH NG'ANG'A.....CITED PARTY**

**RULING**

1. Before the Court is a Notice of Motion Application under Order 40 Rule 3 of the Civil Procedure Rules 2010, Section 63 and 3A of the Civil Procedure Act (Cap 21 Laws of Kenya) Section 36 of the High Court (Organisation and Administration Act No. 27 of 2015, Section 13 of the Employment and Labour Relations Court Act 2011, Rules 16 and 30 of the Employment and Labour Relations Court (Procedure) Rules, 2010 and all the other enabling provisions of law; being an application for orders of contempt of Court:

*1. That this Honourable Court be pleased to certify this Application urgent. Service of the application notice to the Respondent be dispensed with and the same be heard ex-parte in the instance.*

*2. That upon matter being certified urgent, the matter be placed before Hon. Justice Hellen Wasilwa, wherein the Notice of Motion Application of the Petition is scheduled to be heard on the 30<sup>th</sup> June 2016.*

*3. An Order of Committal to Civil jail or fine to be made against Eng. Joseph Ng'ang'a, the Chief Executive Officer, of the Respondent herein, to prison for such period as this Honourable Court may deem fit and just in that he, the said Eng. Joseph Ng'ang'a has disobeyed the order and or acted in contempt of the order made herein by this Honourable Court on the 13<sup>th</sup> day of June 2016, by Hon Hellen Wasilwa sitting in the Employment and Labour Relations Court of Kenya at Nairobi in Constitutional Petition 90 of 2016:*

*a. That pending the hearing and determination of this application inter parties the Court issued a conservatory order restraining the Respondent either by itself, employees, servants and/or agents from, suspending, summarily dismissing and or terminating the Petitioner from her employment and from taking any disciplinary action against her as there is no*

***disciplinary issue against the Petitioner/Applicant pending before the Respondent.***

***4. That the property of the said Eng. Joseph Ng'ang'a, the Chief Executive Officer of the Respondent herein be sequestrated (sold) in default of payment of the fine in that the Court may impose on him.***

***5. That Eng. Joseph Ng'ang'a, the Chief Executive Officer of the Energy Regulatory Commission to pay costs of this Application personally.***

2. Which application is grounded on the matters set out in the Supporting Affidavit of Josephine Mueni Mutunga as well as:

***a. That the Honourable Court granted the Application orders on the 13<sup>th</sup> day of June 2016 that were meant to restrain the Respondent from terminating her employment service and the Cited Party has flagrantly disobeyed without any due care as to the consequences of their action.***

***b. That I am aware that the said Cited Party despite having been served with the said Court Order and having knowledge of the Order of this Honourable Court made on 13<sup>th</sup> day of June 2016 and in spite of numerous prior and subsequent demands and reminders from the Applicant/Petitioner, have neglected, failed and/or refused to comply and persist in such refusal to allow the Applicant to continue to perform her work as the Commission Secretary.***

***c. That failure to carry out the order as directed by the Court was in total disregarded and disobedience to Court Order and that the Applicant is aggrieved by the disobedience.***

***d. That good order and the rule of law demanded that a Court Order be obeyed.***

***e. The Cited Party has flagrantly, deliberately and contumaciously breached or disobeyed this Court Order granted on the 13<sup>th</sup> day of June 2016.***

***f. That the above actions of the Respondent are offences against the administration of justice as the said actions impede and obstruct the course of justice.***

***g. The contempt proceedings are necessary in order to maintain the dignity of this Court and the proper administration of the law.***

***h. The disobedience of orders of the Court belittle or is meant to lower the dignity and authority of Court the must be protected at all times.***

***i. The culture of disobeying Court orders and decisions has reached very high levels in Kenya and the Courts must exercise their constitutional authority of punishing people for contempt of Court irrespective of their positions or station in life.***

***j. The blatant refusal by the Cited Party to obey a valid court order is in contempt of Court.***

***k. The Applicant has no other way of enforcing the said order.***

***l. In the circumstances, the Court to compel and direct the Cited Party herein to stop further unlawful action by terminating the employment of the Petitioner.***

3. The Respondents' Cited Party has filed a Replying Affidavit filed on 18<sup>th</sup> July 2016, deponed to by Eng. Joseph Ng'ang'a the Chief Executive Officer of the Respondent.

4. They state that Petitioner was an employee of the Energy Regulatory Commission (ERC), the Respondent herein and was employed as the Corporation Secretary with effect from 19<sup>th</sup> December 2008,

until 10<sup>th</sup> June 2016.

5. They state that the Commission during its 58<sup>th</sup> Special Meeting held on the 9<sup>th</sup> June 2016, at 11.00 am, it was resolved to summarily dismiss the Petitioner for reasons stated in the minutes, she was informed of this decision *via* email and a meeting between the Chairman of the Commission, the Deponent and the Claimant herself was set.

6. The Deponent drafted a Notice of Dismissal, forwarded to the Chairman of the Commission for confirmation, and a meeting was scheduled for the 10<sup>th</sup> of June 2016, whose purpose was to effect service of the dismissal letter to the Petitioner.

7. The Petitioner got wind of the purpose of the meeting and failed to turn up for the meeting, she was away from the office without leave or permission, and the decision to inform other employees was made.

8. The Deponent did not make any other attempt to serve her with her dismissal letter; however, he avers that the same letter was served on her by two other Commission members namely Eng. Samuel Mangu and Dr. Sellah Kebenei on instruction of the Chairman of the Commission.

9. The Deponent avers that he was never served with the order issued by this Honourable Court on the 13<sup>th</sup> of June 2016, and contempt of Court proceedings are personal in nature and therefore knowledge of the order is utmost importance.

10. They aver that at the time when the orders were issued, the same were incapable of compliance as the Commission had already made their decision and therefore, there was nothing to restrain and the orders were incapable of compliance.

11. They aver that the Petitioner came to Court with unclean hands as the Petitioner came into Court long after the dismissal, more so the Cited Party Deponent is but an *ex officio* member of the Commission with no vote and is incapable of reinstating her after the dismissal by the Commission and payment of three months in lieu of notice.

12. They aver that the Honourable Court should take judicial notice of the nature of the Respondent as a State Corporation whose operations is regulated by the statues including the Energy Act that spells out the roles of various officers, their appointments and dismissal.

13. That without prejudice to the foregoing, they aver that the Order which forms the basis of the contempt application must conspicuously display a penal notice warning of the consequences of disobedience and that in this case, the order has failed to comply with that mandatory provision and therefore the application for contempt cannot be sustained.

14. In response to the Cited Party's Replying Affidavit, the Applicant has filed a Supplementary Affidavit where they aver:

***1. That the Cited Party informed her that the Chairman of the Commission would come either on Monday 13<sup>th</sup> June 2016 or Tuesday 14<sup>th</sup> June 2016 and not 10<sup>th</sup> June 2016 but was not informed of the reason of his coming nor, was agenda items for discussions provided to her. She was therefore left in the dark as to the substance of the discussion.***

***2. That the Claimant went to the office on the 10<sup>th</sup> of June 2016 but had to leave to deal with an emergency on her farm, she spoke to the Cited Party on phone and he gave her permission to travel to Machakos County to attend to the said emergency. She spoke to her Secretary to inform the Chairman that she would be unavailable and requesting the rescheduling of the meeting to Monday 13<sup>th</sup> June 2016.***

***3. That she fell ill over the weekend and sought medical treatment and on the 13<sup>th</sup> of June 2016***

sought the attention of a Dr P. W Kamau who gave her three days sick off.

4. That she was called by the Cited Party on the 15<sup>th</sup> of June 2016 at around 7 pm informing him of her illness but was told that she had strict instructions to give her the letter of dismissal and should not expect to resume duty at all; he stated that he was aware of the Court order but did not care of it at all.

5. She avers that she went to the office on the 16<sup>th</sup> of June 2016, but did not have access to her office, she was later allowed in by the Cited Party. She was later called into his office where she found Dr. Sella Kebeni and Eng. Samuel Maugo, and the Cited Party handed her the dismissal letter, and handed her a delivery book to sign and acknowledge receipt.

6. They aver that the omission to endorse the order with a penal code notice does not vitiate the order and is not a ground to disobey the order.

7. The response filed by the Cited Party is therefore bad in law for want of justifiable cause, it is ill conceived, lacks merit and an abuse of the Court process.

15. In their submissions, the Applicant submits that the Cited Party acted contrary to the provisions of the Court Order granted on the 13<sup>th</sup> of June 2016 by issuing the letter of summary dismissal against the Applicant and a memo of exit to employees stating that he does not care about the Court order which was in place at the time.

16. They rely on the case of Teachers Service Commission vs. Kenya National Union of Teachers & 2 Others [2013] eKLR where Ndolo J observed that:-

*“The reason why Courts will punish for contempt of Court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the Judiciary or the Court or even the personal ego of the presiding judge. Neither is it about placating the Applicant who moves the Courts by taking out contempt of proceedings, it is about preserving and safeguarding the rule of law.”*

17. They submit that the obedience of a Court order is fundamental to all the administration of justice and the rule of law. A Court order once issued binds all and sundry, the mighty and the lowly equally without exception. It is to be obeyed and not otherwise, therefore, the conduct of the Cited Party was and still is contemptuous of this Honourable Court’s Order.

18. They submit that the Orders were issued by a Court of competent jurisdiction, relying on a number of cases that have discussed the details of jurisdiction of the High Court and the Court of Appeal in dealing with matters relating to contempt of Court.

19. They cited the recently decided case of Justus Kariuki Mate & Another vs. Hon Martin Nyaga Wambora & Another Civil Appeal No. 24 of 2014 where the Court had the opportunity to interpret and apply Section 5 of the Judicature Act and made the following observation:

*“It is imperative in considering this issue to take into account the applicable law and the governing principles in contempt proceedings. As correctly pointed out by this Court in Christine Wangari Gachege -vs- Elizabeth Wanjiru Evans & 11 Others, - Civil Application No. 233 of 2007 the statutory basis of contempt of Court in so far as the Court of Appeal and the High Court are concerned is Section 5 of the Judicature Act and Section 63(c) of the Civil Procedure Act. Of relevance to this case is Section 5 of the Judicature Act which provides:-*

*“ 5(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.*

***(2) An order of the High Court made by way of punishment for contempt of Court shall be appealable as if it were a conviction and sentence made in exercise of the original criminal jurisdiction of the High Court.”(Emphasis added).***

***[24] Based on the foregoing provision, the applicable law in contempt proceedings in Kenya is the law applicable in the High Court of Justice in England at the time the application for contempt was filed in the year 2014.”***

20. Further Section 63 (c) of the Civil Procedure Act provides that:

***63 “in order to prevent the ends of justice from being defeated, the Court may if it is so prescribed:***

***a)....***

***b)....***

***c) Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property is attached and sold..”***

21. Pursuant to Section 63(c) above, it is provided in Order 40 Rule 3(1) of the Civil Procedure Rules that:

***“3(1) in case of disobedience, or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”***

24. They submit that the Applicant came in to this Court in terms of Order 40 Rule 3 of the Civil Procedure Rules read together with Section 63 of the Civil Procedure Act thus does not require leave to commence the contempt of Court proceedings before this Honorable Court. The Court therefore has jurisdiction to determine the matter.

23. They submit that the Cited Party has acted in disobedience of the Court Order by continuing to prevent the Applicant from assuming their office, such act, is contempt of Court and an offence as was held in the case of **Margaret Wambogo Nyaga vs. Clerk to Embu County Council & 2 Others [2011] eKLR Miscellaneous Civil Application 176 of 2006** where the Judge quoted with approval the case of **Hadkinson vs. Hadkinson (1952) AER 567** in the following terms:

***“it is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”***

25. They submit that the Cited Party had full knowledge of the Court Orders issued by this Court and still acted in breach. The effect of such conduct is to prejudice a party to the suit in the eyes of the public. Further, they rely on the case of **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828** Ibrahim J stated:

***“ it is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved Contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends to cases where the person affected by an order believes it to be irregular or void.”***

25. The Applicant submits that service was personally effected on the Respondent, however, they also state that in the recent past, Courts have made a departure from the demand that there must be personal service upon the persons affected by the order. To this end, they rely on the case of **Shimmers Plaza Limited [2015] eKLR**; the Court of Appeal quoted with approval the decision in the case of **Justus Kariuki Mate & Anor (Wambora Case)** where the Court said that:

***“personal service is not mandatory and stated that as per Rule 81.8, dispensation of service on the basis of notice or knowledge of the terms of an order will only apply to a Court judgment or order requiring a person not to do an act that is prohibitory order”.***

26. The dispensation of service under Rule 81.8 (1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied as the person or his agent can be said to either have present when the judgment or order was given or made; or was notified of its terms by telephone email or otherwise.

27. They submit that the Cited Party had knowledge of the Court Order as is demonstrated in the supplementary affidavit of the application dated 20<sup>th</sup> day of July 2016 at paragraph 17 when he states that by the time the order was served they were incapable of compliance.

28. They submit that the Cited Party should be punished so as to maintain the dignity of Court and contribute to the Rule of law and good order in society. They rely on the case of **Republic vs. Kenya School of Law** where the Court stated that:

***“ a strong message must be sent to those who are intent on disobeying Court orders; such conduct ought not to be tolerated no matter the status of the Contemnors in the society. .. contempt is such an ugly monster, the Courts should hound it wherever it rears its ugly head and wherever it seeks to take cover behind any craft or innovation”.***

29. They conclude that the Cited Party ought to be punished for his willful disobedience of this Court orders.

30. The Cited Party submits that it is imperative that they should have been served with the order for there to be contempt of the said order. They rely on the Court of Appeal case of **Ochilo & Another vs. Okombo & 4 Others (1989) KLR**; which lays principles or test to be met in contempt proceedings. In **Hermanus Phillipus Steyn vs. Radio Africa Group Ltd & 3 Others [2015] eKLR**; Mabeya J cited with approval the finding in **High Court Misc. Application No. 470 of 2010 Abdi Kadir Adan vs. Ibrein Bore Cheda** where the Court held:

***“Before one can be found guilty of contempt of Court by disobeying a Court order it is imperative that one should have been served with the Court order alleged to be disobeyed. Such service is a condition precedent to finding the alleged Contemnor guilty of contempt of Court, and the service should be effected on him or her personally. Suffice to say that in the case of Ochino and Another vs. Okombo and Others (1989) KLR 165 the Court of Appeal held that as a general rule, no order of the Court requiring a person to do or abstain from doing any act may be enforced by committing him for contempt unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.”***

31. The said Court of Appeal principles were enunciated (**Ochino vs. Okombo supra**) in **Sam Nyamweya & 3 Others vs. Kenya Premiere League & 2 Others [2015] eKLR**:

***“As a general rule, no order of Court requiring a person to do or to abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question”.***

***The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him***

*to obey it.*

***The Court will only punish as contempt a breach of injunction if it is satisfied that the terms of the injunction are clear unambiguous.***

***The defendants had proper notice of the terms and the breach of the injunction must be proved beyond reasonable doubt.***

***The proper procedure for bringing the application for contempt”.***

32. They submit that the Applicant did not meet the Cited Party, has not indicated whether any efforts were made to serve the Cited Party, and has not given the name of the alleged legal officer who was ostensibly served with the Court order. Finally, they submit that the Deponent does not indicate any assurances that the said order would be brought to the attention of the Cited Party.

33. They submit that the only thing that can supersede the requirement of personal service is knowledge behavior of the affected party alluding to the knowledge of Court order.

34. They rely on the case of **Sam Nyamwea vs. Kenya Premier League Limited & 2 Others** where the Court cited the case of **Basil Criticos vs. Attorney General & 8 others** where Lenaola J held that:

***“.. the law has changed today and as it stands today knowledge supersedes personal service....where a party clearly acts and shows that he had knowledge of a court order, the strict requirements of personal service must be proved is rendered unnecessary..”***

35. They submit that they had no prior knowledge of the order, and nothing in evidence has been given to show the Cited Party knew of the order. It cannot be assumed that the Cited Party knew of the order.

36. The Cited Party submits that the Notice of Motion should further fail on the lack of endorsement with a penal notice. They rely on the case cited in the **Nyamongo case of Wang’onde vs. Nairobi City Commission [1988] LLR 1919 [CAK]** which confirmed the mandatory nature of the requirement:

***“..it is clear from this [lack of penal notice] that the appellant did not comply with the mandatory provisions of Section 5 (1) of the Judicature Act with the result that his application was incompetent. It must follow that there was no valid application for contempt of Court before the Judge.”***

37. They submit that a penal notice is a matter of law and not course. It is not a mere technicality as alleged by the Applicant. Contempt of Court proceedings are criminal in nature and denial of liberty of an individual and for that reason the law must be clear and followed.

38. The Cited Party submits that order came after he had already been dismissed from employment when the Court order was granted by the Honorable Court on 13<sup>th</sup> June 2016. The Respondent had dismissed the Commissioner on the 9<sup>th</sup> of June 2016, and the decision was awaiting communication of the 10<sup>th</sup> of June 2016 but the Applicant ran away on purpose making it impossible to do so.

39. The Cited Party submits that he had no control over the Applicant; he is an *ex officio* member of the Commission and could not terminate or suspend the Petitioner. By virtue of that they submit that they could therefore not breach the order as it was not up to him to implement the order.

40. They cite the cases of **Mathew Kiptoo & Another vs. Ronald Chelangat Trading as Yatrin Investment [2015] eKLR** Lady Justice Linnet Mulwa held:

***“in this matter before me, I find that the Appellants/tenants misled the Court to issue orders which they knew could not enforce or obeyed by the Respondents as eviction had already taken place. This was dishonest and mischief on their part.***

***The Court finds that there were no orders that the landlord could have said to have disobeyed the act the order sought to restrain having taken place either, there is no other basis upon which the cited contemnors could be found to have disobeyed the Court order.”***

41. They conclude by reiterating the service of the termination letter was done by Commissioners and not the Cited Party. The Cited Party had no power to terminate the Applicant and cannot therefore be contempt. They state that the application is an abuse of the Court process and urge the Court to dismiss.

42. Having considered the submissions and pleadings by both parties, this Court has to determine the following issues:

***1. Whether the Cited Contemnor had knowledge of the Court order dated 13.6.2016.***

***2. If the alleged Contemnor did or omitted to do anything in total disregard of the said Court order.***

***3. What Orders to grant in the circumstance.***

43. On the 1<sup>st</sup> issue, as cited in the cases, personal service of any Order for purposes of contempt is no longer necessary. The law has been established on this issue that what the Applicant should prove is that the alleged Contemnor had knowledge of the Court Order.

44. See Employment and Labour Relations Court (ELCR) Case No. 1380 of 2013 **Professor Mwaniki Silas Ngari vs. Prof John S. Akama and Another eKLR 2015; Sam Nyamweya vs. Kenya Premier League Limited & 2 Others; Justus Kariuki Mate and Another (Wambora case)**. The Courts have established that personal service is no longer necessary and what should be demonstrated is the fact that the Contemnor had knowledge of the Court Order.

45. In the case before me, the Applicant vide their affidavit of service have deponed that the Order of Court dated 13.6.2016 was served upon the Respondent’s Legal Officer on 13.6.2016. The stamped copy is annexed to this application as Appendix 1.

46. The Respondents have averred that the Legal Officer who was served is unknown. However refer to Rule 12(1) of the Industrial Court (Procedure Rules) 2010 (now repealed) state as follows:

***“12(1) service on a Corporate body may be effected:***

***a. On the Secretary, the Director or any other Principal Officer of the Corporate body.....”.***

47. I believe the Order of this Court was properly served as per Rule 12(1) on the Respondent’s Commission Secretary.

48. The next question then is whether the alleged Contemnor had knowledge of this Court Order. I will start from the premise that the alleged Contemnor is the Chief Executive Officer of the Respondent and the buck stops at his door for anything happening in the Respondent’s Corporation. Paragraph 17 of the Replying Affidavit sworn by the alleged Contemnor herein state as follows:

***“That having stated that, I wish to point out the fact that as at the time the orders were issued, the same were incapable of compliance as the Commission had already made a decision as stated above. There was therefore nothing to restrain and the orders were incapable of compliance”.***

49. What the alleged Contemnor is stating is that by 13<sup>th</sup> June 2016, the Respondent had made a decision incapable of being overturned. However, this Court notes that as by 13<sup>th</sup> June 2016, the Applicant Petitioner had not received her dismissal and so the alleged Contemnor knew that dismissal had not been served upon the Petitioner.

50. To me there is proof that the alleged Contemnor had knowledge of the Court order.

51. On the 2<sup>nd</sup> issue, it is also clear that the alleged Contemnor went ahead and acted in due disregard of the Court Order which he states was incapable of being obeyed. This he did by finally having a dismissal letter served upon the Petitioner on 16.6.2016 after receiving the Court Order on 13.6.2016.

52. This was indeed contempt of this Court. It does not matter whether the Contemnor thinks that the Order of Court is incapable of being enforced, the civil thing to do was to obey it by not serving any dismissal letter upon the Petitioner. However, the alleged Contemnor acted in disregard of this Court Orders.

53. It has been stated and I do restate again that a Court Order must be obeyed and it does not matter what the Respondent feels about it, he must first obey it and then question its applicability.

54. The law of contempt was made to safe guard the dignity of the Court and this Court will not fold its hand and watch as the Court's dignity is put in disrepute. Contempt must be punished.

55. I therefore find the alleged Contemnor Eng. Joseph Ng'ang'a guilty of contempt of Court and I will reserve any punishment until he is heard in mitigation.

Read in open Court this 29<sup>th</sup> day of September, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Achiando for Petitioner - Present

Miss Atuya holding brief Wairagu for Cited Party – Present