



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2055 OF 2014

BENJAMIN TEZI BONGO.....1ST CLAIMANT
STEPHEN IKONYA KIARIE.....2ND CLAIMANT
MATHILDAH O. OMOLLO.....3RD CLAIMANT

VERSUS

THE UNITED KENYA CLUB.....1ST RESPONDENT
SHEM ODUOR NOAH.....2ND RESPONDENT
KIMANI MUHORO.....3RD RESPONDENT
MATHEW P.N. SISENDA.....4TH RESPONDENT
PRAXEDES TOROREY.....5TH RESPONDENT
WILBERFORCE O WANYANGA.....6TH RESPONDENT
WILLIS O. KOSURA.....7TH RESPONDENT
ANTHONY BURUGU.....8TH RESPONDENT
MICHAEL KOECH.....9TH RESPONDENT

RULING

1. Before the Court are Claimants' Notice of Motion dated 9th December 2014 and the 1st Respondent's Notice of motion Application dated 21st November 2014.
2. The Claimants' application sought punishment against the Respondents for contempt of the Court orders issued on 17th November 2014 while the 1st Respondent's application sought to vacate or lift the orders granted to the Claimants on 17th November 2014.
3. Parties consented to prosecute the applications through written submissions. The 2nd, 3rd, 4th, 5th,

6th, 7th, 8th and 9th Respondents submitted that they complied with Court orders and reinstated the Claimants as ordered by this Honourable Court. They submitted that subsequent to the reinstatement the 1st Respondent sent the Claimants on compulsory leave to pave way for investigations. The 2nd to 9th Respondents relied on the case of **Ochino & Another v Okombo & 4 Others [1989] KLR 165** where the Court of Appeal held that as a general rule, no order of 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. In addition the Court of Appeal held that the copy of the order must be indorsed 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.

4. The 1st Respondent did not file submissions though a Replying affidavit was filed. In the replying affidavit sworn by Shem Oduor Noah on behalf of the 1st Respondent it was deposed that the Claimants were reinstated in compliance with the Court order. Evidence of the reinstatement was the letters issued to the Claimants as well as payslips indicating the Claimants continued to draw their full salaries.
5. The Claimants filed their submissions on 11th March 2015. In the submission they submitted that the Respondents committed contempt of court by disobeying the court orders issued by this Court. The Claimants submitted that the 2nd to 9th Respondents were all aware of the court order as they instructed counsel to challenge the court orders through the notice of motion application seeking a reversal of this Court's orders. The Claimants submitted that the order was served together with the suit papers upon the Respondents and that the Respondents instructed counsel sought to set aside the orders through counsel they appointed to act for them. The Claimants submitted that the Respondents were thus aware of the order and thus refusing them to resume work was contempt of the court order. The Claimants relied on **Shimmers Plaza Limited v National Bank of Kenya Limited Civil Appeal No. 33 of 2012**, **Jeremiah Kalachi Olulenyi v William Ngotiek [2014] eKLR** and **Africa Management Communication International Limited v Joseph Mathenge Mugo & Another [2013] eKLR**. The Claimants urged the Court to allow their application and cite the Respondents for contempt.
6. For matters of contempt in our jurisdiction the recourse is to the Judicature Act as a starting point. There is a provision under Section 20(7) of the Industrial Court Act that anyone who without reasonable cause fails to comply with a Court order under 20(4) commits an offence and is liable upon conviction to a fine not exceeding 200,000/- or to a term not exceeding 6 months or to both. That said, the true basis of the law of contempt is Section 5 of the Judicature Act Cap. 8 Laws of Kenya. Section 5 of the Judicature Act provides as follows:-
 - 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 the exercise of the ordinary original criminal jurisdiction of the High Court. (Underline mine.)
7. To prove contempt, the applicant (accuser or prosecutor) must prove the following four broad elements of contempt:
 - a. That there is in existence of a lawful order,
 - b. The person accused of contempt had knowledge of the order
 - c. The person accused of contempt had ability to comply with the order; and finally
 - d. The person accused of contempt failed to comply with the order
8. These ingredients must all be in place. The order must be lawful and the person accused of disobedience must have had knowledge of the order and failed to comply with the order in spite of

having the ability to comply. The proof required is slightly above the balance of probabilities but below proof beyond doubt applicable in criminal cases.

9. In **Cause No. 421(N) of 2009 Kenya Airways Ltd. Vs. Aviation & Allied Workers Union** the Industrial Court said the following on the need to obey court orders:-

“One of the hallmarks of an open and democratic society is the respect accorded to the authority and dignity of the courts of law. The rule of law demands that all persons must obey court orders whenever they are issued. This is vital for stability and good governance. The respondent’s action undoubtedly undermined and eroded the authority and dignity of the court and set a dangerous precedent which should never be followed. Consequently the court cannot ignore what transpired as to ignore the same would be tantamount to watering and nurturing the seeds of impunity and lawlessness. It is the duty of the court to firmly deal with parties who willfully disobey its orders. Even though the respondent is not complaining since the strike has been terminated, this court is mandated to deal with matters of contempt of court which arise before it. We will not shy away from this task in the interests of the rule of law.”

10. The general rule or practice as stated in **Borrie & Love on the Law of Contempt 3rd Edition 1996**, is that “it is required that such allegations of contempt be disposed off first before the alleged contemnor can have audience before the court or tribunal concerned”.

11. I concur and agree with the words of the learned judges of the Court of Appeal in **Commercial Bank of Africa Ltd. v. Ndirangu [1991] LLR 2163 (AK)** that:

“It is imperative that orders of the court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority of the courts. The blatant disobedience of the court’s consent orders in this case renders any transactions in breach of the order to be void and the learned judge was fully justified in making the order complained of. To allow the appeal would be tantamount to rewarding the guilty parties for this grave contempt of court.....”

12. This would have been a fit case to grant the orders had the Respondents not complied with the Court orders. They did comply by reinstating the Claimants to their positions and paying their salaries. I therefore cannot commit the alleged contemnors as there was obedience to the Court order. The suspension meted out to the Claimants was an aspect of the employment relationship the 1st Respondent was bound to enforce if there was merit in the same. In the present case there are investigations under way and the Court would not wish to interfere with them save as to direct that they be concluded in the next 30 days as they have been ongoing for a while now.

13. In view of the decision not to interfere with the ongoing process I will not revise the orders granted. Each party will bear their own costs for the applications made to Court.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of April 2015

Nzioki wa Makau

JUDGE