



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 12 OF 2015

JAMES OMARIBA NYAOGA.....1st PETITIONER

JOSEPH MARANGA AMENYA.....2nd PETITIONER

v

THE SPEAKER OF THE COUNTY ASSEMBLY (KISII).....1st RESPONDENT

THE COUNTY ASSEMBLY SERVICE BOARD (KISII).....2nd RESPONDENT

THE KISII COUNTY ASSEMBLY.....3rd RESPONDENT

RULING

1. The 2 Petitioners, James Omariba Nyaoga and Joseph Maranga Amenya (Clerk, County Assembly of Kisii and Director of Finance, County Assembly of Kisii respectively) filed the instant Petition against the Respondents at the Employment and Labour Relations Court in Kisumu on 14 May 2015. They were alleging violation and infringement of their fundamental rights.
2. Filed together with the Petition was a motion under certificate of urgency seeking several conservatory orders.
3. On the same day of filing, the file was placed before Mrs. Owino (Deputy Registrar-Kisumu). In the notes taken by the Deputy Registrar, it was recorded that the Court (read Judge) was on leave and therefore the Deputy Registrar directed that the file be placed before the Employment and Labour Relations Court sitting in Nakuru.
4. The very same day, the file was transmitted to Nakuru and was placed before me. Mr. Mboya appeared for the Petitioners while the Respondents were not represented.
5. After hearing submissions from Mr. Mboya and perusing the motion, I certified it urgent and also granted prayer 2 of the motion and directed that the motion be served for *inter partes* hearing on 21 May 2015.
6. The effect of the order granted was that the Respondents were temporarily enjoined from commencing disciplinary action, suspending or interfering with the Petitioners discharge of duties without complying with the provisions of the County Government Act and the Public Finance Management Act, 2012.
7. On 20 May 2015, a day before the return date for the motion, a Kenyan going by the name Tabitha Okongo wrote a complaint letter to the Resident Judge, Nakuru High Court copied to the Chief Justice

and the Principal Judge and myself.

8. The Kenyan was complaining that the members of the County Assembly of Kisii had no confidence in me because of the interim orders I had issued *ex parte*. She further complained that the orders were irregularly obtained and were meant to benefit persons who had stolen public funds.

9. According to this Kenyan, I had failed to discharge my mandate judicially and was therefore a big shame to the judiciary. She further alleged that the Petitioners and their advocate had been boasting that they were assured of getting the orders sought.

10. The Kenyan penned off the complaint by asking that I disqualify myself from handling the matter and refer back the matter to Kisumu.

11. The Kenyan signed off her missive as *Tabitha Okongo, Member of Justice and Legal Affairs Committee Kisii County Assembly*.

12. When the motion came up on 21 May 2015, and because the complaint raised serious issues of integrity, I summoned the said Tabitha Okongo to appear in Court on 29 May 2015 to explain the allegations.

13. I further directed that she files an affidavit on the allegations. The summons were issued pursuant to section 20 (4) of the Employment and Labour Relations Court Act.

14. Tabitha Okongo duly appeared on 29 May 2015, but her advocate Mr. Biko sought time to formally come on record. The Court granted the request and the proceedings were adjourned to 8 June 2015.

15. On 4 June 2015, the Respondents filed a motion seeking that I disqualify myself, transfer the Petition to Kisumu and set aside the orders issued on 14 May 2015.

16. On 8 June 2015, Mr. G.M. Nyambati, Advocate for the Respondents informed the Court of his motion filed on 4 June 2015 and also objected to proceedings going on because according to him, the Court should dispose of his application filed on 4 June 2015 first and that the Court had not granted leave for the cross examination of Tabitha Okongo and further that the cross examination would prejudice his application.

17. Mr. Biko for Tabitha Okongo also raised objections that the summons had been issued by the Court *suo moto* and that the Petitioners counsel had no competence to cross examine his client and that her clients constitutional right to fair hearing was threatened with violation.

18. Mr. Mboya for the Petitioners in response stated that the Respondents motion was not filed under certificate of urgency and it had not been slotted for hearing and therefore the said motion could not be given priority. He further submitted that Tabitha Okongo was not a party to the proceedings yet she had written a letter about the proceedings.

19. According to Mr. Mboya, Tabitha Okongo was a witness fit to be cross examined on her letter by himself and the Court because the letter mentioned the Petitioners advocate.

20. The Court reserved a ruling on the objections.

21. Section 20(4) of the Employment and Labour Relations Act has given this Court wide power to summon any person to give evidence when dealing with a matter before it.

22. Tabitha Okongo wrote a letter whose contents were directly implicating a matter before Court. The letter made serious allegations concerning the integrity of the Court's handling of the matter and the ethical and professional conduct of the Petitioners Advocate.

23. The allegations were made by a party who was not a party to the proceedings. The allegations directly affected the handling of the Petition and administration of justice. The Court was therefore perfectly entitled to *suo moto* summon the author of the complaints.
24. The summons were express as to what Tabitha Okongo was to explain and when and where.
25. The objections by Mr. Biko and the motion by Mr. Nyambati were therefore red herrings meant not only to scuttle the purpose for summoning Tabitha Okongo but to muddy the issues for consideration.
26. The Court rejects the objections and dismisses the motion by Mr. Nyambati.
27. Back to the matter at hand.
28. On 8 June 2015, Tabitha Okongo was led on her affidavit and cross examined by her Advocate, the Petitioners and Respondents Advocates on record. The Court has already made reference to the contents of the letter and will now explore what Tabitha Okongo stated in Court.
29. Tabitha Okongo stated that she is a nominated member of the County Assembly of Kisii and that a Committee of the Assembly met and made recommendations against persons suspected of misappropriation of funds meant for a medical cover.
30. She stated that she was aware that this Petition and Cause No. 271 of 2014 were filed in Kisumu but were transferred to Nakuru and that orders emanating from Nakuru were served and this made her suspicious.
31. According to her, it was strange that a matter filed in Kisumu would be transferred to Nakuru and not Kericho which also had an Employment and Labour Relations Court, but she did not know whether the Court in Kericho was sitting or how the file was taken to Nakuru.
32. She also stated that the Petitioners Advocate had bragged to the Speaker of the County Assembly, a Mr. Isaiah Mosota and herself.
33. On being asked in cross examination on which advocate of the Petitioners she referred to in her letter, she gave the name of a Mr. Momanyi Aunga, Advocate.
34. She admitted writing the letter dated 20 May 2015 on the letterhead of the County Assembly of Kisii though it was a personal letter and stated that as a Kenyan she had a right to complain.
35. She denied that she was reckless or careless.
36. There are some indisputable conclusions which can be made from the facts established. First, Tabitha Okongo is a member of the County Assembly of Kisii and also a member of the Justice and Legal Affairs Committee.
37. Two, Tabitha Okongo was and is not a party to the instant Petition or any other Cause before this Court.
38. Three, the Petitioners Advocate on record, Mr. Joseph Ogutu Mboya did not boast that the Petitioners were assured of getting orders sought from this Court.
39. Four, that the purported advocate who boasted, Momanyi Aunga is unknown to the Court and is not on record.
40. Five, that the Judge presiding over the Employment and Labour Relations Court, Kisumu was on leave at the material and relevant time.

41. Six, the Petition and the motion under certificate of urgency were transmitted to the Court in Nakuru pursuant to an order by the Deputy Registrar, Kisumu.

42. Seven, that the Respondents and more so the 3rd Respondent had been served by the Court orders granted on 14 May 2015, and as a party directly involved had not raised any issues with the grant of the orders.

43. Eight, Tabitha Okongo did not bother to establish and or inquire from the Respondents advocate on record how and under what circumstances the file was transferred to this Court.

44. Emerging from the facts as established, the Court needs to discuss the scope and extent of comments which can be made by a party who is not directly involved in Court proceedings on the conduct of the proceedings.

45. Of the course any Court dealing with an issue as presents itself here must be cautious to remain objective and not fall into the danger of being seen as pursuing a subjective agenda, but at the end of the day, the integrity in the administration of justice must be preserved and maintained.

46. The starting point of course must be the holding by the Supreme Court in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* (2013) eKLR that

It was a legal and constitutional obligation of any Court, from the basic level to the highest level, to preserve and protect the adjudicatory forum of governance, and to uphold decorum and integrity in the scheme of justice delivery.

47. This holding by the Supreme Court also partly answers the objections raised by Mr. Biko and Mr. Nyambati.

48. Further, the law as I understand it and I take comfort in the decision of Gikonyo J in *Eliud Muturi Mwangi (practicing in the name and style of Muturi & Company Advocates) v LSG Lufthansa Services Europa/ Africa GMBH & another* (2015) eKLR that a third party who is not participating in a suit can be cited for contempt for perverting the course of justice or administration of justice.

49. In the instant case, Tabitha Okongo, a member of a collective which had been sued and served with court process instead of approaching the collectives legal counsel and without attempting to confirm the facts as to how the file was placed before this Court went off tangent by making allegations which can only be said to be reckless.

50. As a leader, the said Tabitha Okongo should be the epitome of courtesy and decorum especially on the roles of the different organs of state and more so the judiciary. Her actions were not those of the fair minded person or the ordinary person in the Kawangware bound bus.

51. It was scandalous for Tabitha Okongo, a person who is not a party to proceedings before Court and who belonged to a collective served with Court orders and which had retained legal counsel to write letters at large asking a judicial officer to disqualify himself from presiding over proceedings and casting aspersions on the Advocate on record without establishing the identity of the said advocate.

52. The Court finds that her action and conduct was deliberate, reckless and was an affront to the course of justice meant to pervert the administration of justice.

53. Tabitha Okongo therefore is directed to write an apology letter copied to the parties mentioned in the letter dated 20 May 2015 within the next 5 days.

54. The Petition herein was placed before the Court in Nakuru because the Judge in Kisumu was on leave. It is only logical that this file be returned to Kisumu as the Judge has now resumed.

55. The Court therefore directs that this file be transmitted back to Kisumu for hearing and disposal.

56. Pending the placement of the file and further directions by the Court in Kisumu, the interim orders issued on 14 May 2015 are extended.

57. And lastly a word to the counsels involved herein. The profession requires courtesy and humility. The Court is a solemn and sacrosanct institution. It is not a theatre in Salem.

Delivered, dated and signed in Nakuru on this 24th day of June 2015.

Radido Stephen

Judge

Appearances

For Petitioners
Advocates

Mr. Ogutu Mboya instructed by Ogutu Mboya & Co.

For Respondents
Advocates

Mr. G.M. Nyambati instructed by G.M. Nyambati & Co.

For Tabitha Okongo

Mr. Biko

Court Assistant

Nixon