REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1380 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 20th August, 2015)

PROFESSOR MWANIKI SILAS NGARI…….....…..……..**CLAIMANT**

VERSUS

PROF. JOHN S. AKAMA…… ……**1ST RESPONDENT**

DR. ENG. S. MWARANIA…….... ……**2ND RESPONDENT**

RULING

1. The Application before court is the originating Notice of Motion dated 16th September, 2013 brought under Section 5 of the Judicature Act and Order 52 Rule 3 of the Supreme Court Practice of England where the Applicant seeks for orders:
    1. **That Prof. John Akama and Dr. Eng. S. Mwarania, *the Respondents herein be each committed to jail for six (6) months to compel them to obey the law.***
    2. ***That the Respondents do pay the costs of this application.***
2. The Application is supported by the following grounds on the face of the Motion and the statement of the Applicant dated 13th September, 2013 and a verifying affidavit sworn on the even date and two further affidavits of the Claimant/Applicant sworn on 7th October, 2013:-
    1. **In the contemporary world, the contract of employment is as jealously protected as property itself as it determines the quality of life of the employer;**

b. **Prof. John Akama and Dr. Eng. S. Mwarania, have disobeyed the order which was made herein on 29th August 2013; in that:**

i. **After he was served with the said order on 29th August, 2013, Prof. Akama withdrew from the Applicant his chauffer driven car to which he is entitled under his contract of employment; the Applicant remains without his chauffer driven car.**

ii. **After Prof. John Akama and Dr. Eng. S. Mwarania were served with the order, they refused to assign an office and duties to the Applicant to enable him to continue serving as the Deputy Principal, Academic Affairs when he reported for work on 30th August, 2013;**

iii. **After Prof. John Akama and Dr. Eng. S. Mwarania were served with the order, they**

purported to compel him to take an indefinite leave which he did not need and for which he has not applied;

iv. **Despite the fact that he has been ready and willing to work, the said Prof. John Akama and Dr. Eng. S. Mwarania whom he has notified of readiness to work have insisted on him not working;**

v. **Prof. John Akama has also deprived him of his monthly telephone allowance in the form of calling cards;**

vi. **Prof. John Akama has caused a circular to be issued falsely informing the staff of the Respondent to the memorandum of Claim that the Applicant has left Kisii University;**

vii. **Prof. John Akama and Dr. Eng. S. Mwarania purported to say farewell to the Applicant after they were served with the order made herein.**

c. **through their actions , the Prof. John Akama and Dr. Eng. S. Mwarania have greatly undermined the authority of this court;**

d. **it is necessary to uphold the authority of this court and the rule of law by having them committed to jail for 6 months;**

e. **Under Order 52 Rule 3 of the Supreme Court Rules of the United Kingdom, the court has power to expedite the hearing of an application of committal to ensure that the undermining of the authority is halted as early as possible,**

3. The Respondents have both opposed the Application and they each filed affidavits in response to the motion.

4. The gist of the Claimant/Applicant's application is that on 29th August, 2013, the Honourable Court made the following Orders:

"***That the Respondent be restrained by itself or its servants and or agents from engaging in acts of constructively and unlawfully dismissing the Claimant from the office of the Deputy Principle Academic Affairs of the Respondent until further Orders***."

5. The Respondent in the Memorandum of Claim was served with the Order through its servants/agents who are the two Respondents in the instant motion via email on 29th August, 2013, which the Respondents admit having received. Subsequently, on 30th August, 2013, a process server, one Nixon Muhatia attempted personal service of the Court Order on the Respondents but alleges that they both evaded service.

6. The Claimant now seeks reprieve from this Court for acts of disobedience by the Respondents of the Court Order of 29th August, 2013. The Claimant has summed up nine acts of contempt by the Respondents which have been set out in the Statement on page 3- 11 thereof but summarizes them in his submissions as:

1. ***On 29th August, 2013, the 1st Respondent deprived the Applicant of the University transport he enjoys in the course of his employment; he failed to offer the Applicant's official driver to pick the Applicant from his house to the University so that he can work despite request via sms sent to the 1st Respondent by the Applicant on 29th August, 2013.***

2. ***On 30th August, 2013, the 1st Respondent refused to allocate an office to the Applicant and give him work even after he (the Applicant) made private travel arrangements to get to the university.***

3. ***On 30th August, 2013, the Respondents excluded the Applicant from the university Council meeting held on the same day by both Respondents despite the fact the Applicant was entitled to attend that meeting in his capacity as Deputy Principal Academic Affairs.***

4. ***At 9.00 p.m on 30th August, 2013, the 1st Respondent sent an employee of the university to the Applicant's home in Njoro to deliver to the Applicant a backdated letter purportedly dated 27th August, 2013, asking the Applicant to 'proceed on leave until further communication because the Applicant had already handed over the office of the Deputy Vice Chancellor Academic Affairs that he had been holding in an acting capacity to Prof. Maurice Nyamanga Amutabi who was appointed to the position.'***

5. ***On 3rd September, 2013, five (5) days after service of the Order made on 29th August, 2013, the Respondents sent an email to the Dean Faculty of Law and Madam Nyongesa a lecturer in the faculty of law a misleading email to the effect that ' as you might know, Prof. Ngari left and Prof. Amutabi is now the DVC Academic…'***

6. ***On 4th September, 2013 the 1st Respondent through an email sent by the Registrar (Administration) Mr. Nyenze delivered another backdated letter from the 2nd Respondent dated 21st August, 2013, informing the Applicant that his Application for the position of Deputy Vice Chancellor, Academic Affairs was unsuccessful. Effectively, the Applicant was constructively dismissed from employment.***

7. ***If, which is denied, the letters referred to above were not backdated, then serving them after the Order of 29th August, 2013, was made and served upon the Respondents and other officers of the University is a contempt of Court.***

8. ***Compelling the Applicant to proceed on leave which he did not need and had not applied for thereby forcing him to stay out of work while the Applicant was always ready and willing to discharge his contractual obligations and the Respondents were fully aware of the Applicant's position.***

9. ***The 1st Respondent refused/failed to forward to the Applicant his monthly telephone allowance in the form of calling cards worth Kshs. 15,000.00.***

7. The Applicant relied on the following Authorities to buttress his application:

1. ***Teachers' Service Commission Vs Kenya National Union of Teachers and 2 others (2013) eKLR***

2. ***Kenya Tea Growers Association Vs Francis Atwoli and 5 Others (2012) eKLR***

3. ***Econet Wireless Limited Vs. Minister for information & Communication of Kenya & Another (2005) eKLR***

4. ***United States University (USIU) Vs Attorney General; High Court of Kenya at Nairobi Petition No. 170 of 2012)***

5. ***Emma Wanjiku Ndungu Vs Francis Njoroge Kamau ad 4 others (2012)eKLR***

6. ***Mike Maina Kamau Vs Hon. Franklin Bett and 6 Others (2012) eLKR***

7. ***Mutitika Vs Baharini Farm Limited (1985) KLR 229***

8. ***Refrigerator and Kitchen Utensils Ltd Vs G.P. Shah and Others, Court of Appeal at Nairobi, Civil Appeal No. 39 of 1990***

8. On the issue of personal service the Applicant submitted that the Courts have addressed the issue where a person evades personal service and subsequently claims that he was not served, then he is deemed to have been served for he is deemed to be aware of the contents of the Order and he is required to obey the Order. The Applicant relied on the following cases:

1. ***Mohamed vs Bakari & 2 Others (2005) 2KLR***

2. ***J.Z. Ochino and Another Vs George A. Okombo and Others, Court of Appeal Nairobi Civil Appeal No. 30 of 1989***

3. ***Justus Wanjala Kisagani and 2 Others vs City Council of Nairobi and 3 Others***

4. ***Justus Nyaribo Vs the Clerk to Nyamira County Assembly (2013) eKLR***

5. ***Kenya Tourist Development Corporation Vs Kenya National Capital Corporation & Another.***

9. The Claimant prays that the Respondent be punished for the various acts of contempt which he submits have been proved beyond a reasonable doubt.

10. The Respondents have opposed the Application *vide* Replying Affidavits sworn on 26th September, 2013.

11. The Respondents have summarized their response as follows:

a. ***That Kisii University was previously a University College established under Kisii University College Order of 2007 made under the Egerton University Act which Act has now been repealed.***

b. ***That this Kisii University College was a Constituent College of Egerton University.***

c. ***The Respondents submitted that under the Kisii University College Order the position of Deputy Principal of the College was provided and this is a position the Applicant herein was appointed to head the Academic affairs of the defunct college.***

12. The Respondents aver that the in year 2012, the Egerton University College Act and Kisii University College Order made thereunder were repealed by the Universities Act 2012 which provided for a uniformed statute for all universities in Kenya. Each University was therefore required to apply for a Charter afresh, regardless of whether it had been in existence or not.

13. Kisii University applied for and was granted a Charter in February 2012 and therefore became a fully-fledged University. Unlike in the repealed Kisii University Order, the position of Deputy Principal was not created or provided for.

14. That this position was therefore abolished and ceased to exist by operation of the law. The Head of the Academic Division in the restructuring arising out of both the University Act and the Charter was now the Deputy Vice Chancellor Academic Affairs.

15. In order to make sure that the structure was maintained, the Applicant who had hitherto served as Deputy Principal Academic Affairs, was now appointed Ag. Deputy Vice Chancellor Academic Affairs which appointment was made pending the recruitment of a substantive holder through competitive processes.

16. The recruitment through competitive process was a requirement of the law under Section 35 (1) paragraph (v) of the University Act 2012.

17. In compliance with the law, Kisii University advertised for the position of the Deputy Vice Chancellor Academic Affairs and other positions and they received 8 applications and 4 persons

including the Applicant were short listed and invited for an interview. After the interview, the Applicant was unsuccessful. One Professor Maurice Amutabi was the successful Applicant and the Council recommended his appointment to the Cabinet Secretary for Education Science and Technology as a requirement of the law. The Cabinet Secretary proceeded to appoint Professor Amutabi and having done so, the 1st Respondent wrote to the Applicant and asked him to hand over to Professor Amutabi which he did. He was also notified that he was not successful in his quest for Deputy Vice Chancellor Academic Affairs.

18. The Respondents aver that it is at this point that the Applicant rushed to court seeking to prevent the University from dismissing him. The Respondents aver that there is no position of Deputy Principal after this and the Applicant cannot come now and say that, that position existed.

19. The Respondents aver that the Applicant was aware that the position of Deputy Principal didn't exist after this and he was notified of this vide a letter dated 21/8/2013 reference JSA 10, and prior to this he proceeded and prepared a handing over report and handed over on 26/8/2013.

20. The Respondents have submitted that the Applicant was not candid with the court. That he mislead the court at the exparte stage and obtained the orders he did. They cited ***The King vs General Commissioner for the purposes of Income Tax Act, the District of Kensington (1917)*** 1 KB 486 where Discount Reading at page 495 stated that the court should refuse to hear merits of a case where an Applicant has not been candid and truthful with the court.

21. The Respondents have asked court to consider whether a restraining order as in this case in respect of an abolished or nonexistent position can give room to contempt proceedings. They cited the Court of Appeal in ***Nyamondi Ochieng and Another vs Kenya Posts & Telecommunication Corporation*** (Civil Appeal No. 264 of 1993) page 30 to 31 of the decision where the Court of Appeal declined to punish for contempt in cases where offices sought to be preserved had already been abolished.

22. The Respondents also aver that the Applicant has not been dismissed by Kisii University as there is no letter of dismissal presented to court. They aver that to date, the Applicant continues to receive his salary.

23. The Respondents further submit that the 9 alleged acts of contempt are not proof of constructive dismissal. They refer to the 1st act of failure to send a car to Njoro after receiving a text message on 29/8/2013. They aver that as at 29/8/2013, the order had not reached the Respondents at all by whatever means and at that time the car was still under the control of the Applicant and at page 168 is a note from the official driver of the Applicant.

24. The Respondents further submit that the official residence of the Applicant was in Kisii and so sending a vehicle to pick him in Njoro was irregular.

25. On the 3rd issue of excluding Applicant from attending a meeting of the University Council on 30/8/2013, the 1st Respondent has indicated that there was a meeting of the Councils Committee on Finance Building, Planning, Development and General Purposes and both Prof Akama in paragraph 47 and 48 states that they never saw the Applicant on that day and in any case the Applicant was not a Member of the Council and could therefore not attend the Councils meetings. Membership of the Council is spelt out in Section 36 of the Universities Act and that Deputy Principal is not one of them.

26. As to other acts, the Respondent avers that they relate to letters written to the Applicant after the interview of the Deputy Vice Chancellor were completed and that there was no mention in them about the position of Deputy Principal, and were also written before the court order of 29/8/2013.

27. As to service of the order, the Respondents have submitted that there was no personal service and

that service was by email which is not proper service. The Respondents submitted that the application be dismissed.

28. The Respondents have further submitted that the 2nd supporting affidavit of the application made on 7th October 2013 without the leave of the court should be expunged from the record.

29. In reply to Respondent's submissions, the Applicants have submitted that the office of Deputy Principal Academic Affairs did not cease to exist when the Universities Act came into existence and this is by virtue of Section 72 to 76 of the Act – which is the transition clause and that Section 80 (4) of the said Act transited all signed contracts of employment and that the Applicant's contract was a 5 year contract and was saved by the transition section of the Act.

30. As to the affidavit of 7/10/2013, the Applicants have submitted that there is nothing limiting the Applicant to only one affidavit of reply. They have urged the court to find for them and commit the Respondents to jail.

Issues for determination

31. Upon consideration of the submissions of both parties, the issues for consideration are as follows:

a. ***Whether the Respondents were aware of the order of the court dated 29th August, 2013.***

b. ***Whether there were any acts of contempt committed by the Respondents.***

c. ***If so, if the said acts are punishable and how.***

32. On the 1st issue, this court made an order on 29/8/2013 that:

"The Respondent be restrained by itself or its servants and/or agents from engaging in acts of constructively and unlawfully dismissing the claimant from the office of the Deputy Principal Academic Affairs of the Respondent until further orders".

33. The Respondents have admitted in their reply to the Memorandum of claim that they were served with the Memorandum of claim, the notice of Motion and supporting affidavit by e-mail on 29/8/2013. The Respondents aver that this was not proper service. The Respondents have submitted that for purposes of contempt proceedings, only personal service is allowed unless there is a court order allowing substituted service under Order 5 Rule 17 of Criminal Procedure Rules.

34. The Applicant submitted on this aspect and cited **J. Z. Ochino & Another vs George A. Okombo & Others** – Court of Appeal Nairobi CA No. 30 of 1989 which states as follows:

"As we read the law, the effect of the English provisions is not as a general rule no order of court requiring a person to do or abstain from doing any act which 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 action".

35. This decision was endorsing the fact of personal service and so are many other decisions see e.g ***Emma Wanjiku Ndungu vs Francis Njoroge Kamau & 4 others (2012) eKLR, Nyamodi Ochieng Nyamogo & Another vs Kenya Posts & Telecommunications Corporation – Civil Application No. Nairobi 264/1993***.

36. The law however has changed. I have had occasion to discuss this issue in ***Petition No. 286/2014*** Kisumu Industrial Court ***Nelco Masanya Sagwe & Another vs County Secretary, Kisumu County & 4 Others*** where I cited the Court of Appeal decision in ***Justice Kariuki Mate & Another vs. Martin Nyaga Wambora (2014) eKLR*** where the learned JJA cited Rule 81.10 of the Civil

Procedure (Amendment No. 2) Rules 2012 of England which states that:

" (3)" The Application notice must:

a. ***Set out in full the grounds on which the committal application is made and must identify separately and numerically each alleged act of contempt including, if known the date of each of the alleged acts and***
b. ***Be supported by one or more affidavits containing all the evidence relied upon.***

(4) Subject to paragraph (5) the application notice and the evidence in support must be served on the Respondent.

(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 by an alternative method or at an alternative place".

37. In the **Wambora case** (supra) the Court of Appeal restated Rule 18.8 and stated as follows, as circumstances which the court can dispense with personal service of an order:

> ***"In the case of a 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 & 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 its terms by telephone, email or otherwise".***

38. The Court of Appeal made a finding that:

> ***"The trial court was correct in holding that the law as this was in contempt of court has since changed. The law as it stands today is that knowledge of law order is sufficient for purposes of contempt proceedings".***

39. This court makes a finding that in this case, the law as restated is that where there is knowledge of a court order, that supersedes personal service in contempt proceedings.

40. In this case, the Respondents indeed had knowledge of the court order having been served by email which they do not deny.

41. Of course the Applicants made further attempt to try personal service on 30/8/2013 but did not succeed. The process server in his affidavit stated that the Respondents willfully evaded service by denying him an opportunity to physically serve them.

42. The Applicants have cited the case of **Mohammed vs Bakari & 2 others (2005) 2 KLR** – a Court of Appeal, 7 - Judge bench holding as follows:

"If personal service is which is the best of service in all areas of litigation is possible, other forms may be resorted to ….. no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man. The appellant could not be allowed to rely on his having successfully hidden himself from the attempts of the 1st Respondent to personally serve him to defeat the 1st Respondents Petition challenging the validity of his election. The effect made by the 1st Respondent to personally serve him amounted to personal service on him and the learned Judge was right in holding that he had been served".

43. Having made a finding that the Respondents were aware of the order of this court through email, the further attempt to serve them was just but a precautionary measure. I therefore find in answer to my 1st issue for determination that the Respondents were aware of this court's order made on 29/8/2013 having been so served through email.

44. On the 2nd issue, in determining whether there were any acts of contempt committed by the Respondents, the chronology of events after the 29th August 2013, will be a point of reference. The application has listed 9 acts allegedly committed in contempt of court.

45. The 1st act complained of is that the 1st Respondent deprived the Applicant of the University transport he enjoys in the course of his employment by failing to send the Applicant's official driver to pick the Applicant from his house to the University. This was despite several requests sent via sms sent on 29/8/2013.

46. in this case, I have looked at the Applicants letter of appointment dated 20/9/2010 where terms of his engagement include:

"Chauffer driven official car"

Was a pick up from Egerton University to Kisii University part of these chauffer driven services?. The Respondents have submitted that this was not an official pick up as the expected official residence of the Applicant was Kisii and not Njoro and that the pick-up was only extended to official duties.

47. I do find that the issue of the Applicant being chauffer driver for official duties was part and parcel of his employment contract and a benefit conferred on him by virtue of that contract.

48. However, the Applicant has not in his affidavit shown that the official driver was prevented from picking him by the Respondent and that the Respondent was in any way in control of the said driver. That act therefore is not in the view of this court punishable as being in contempt of this court's orders.

49. The events occurring from 30th August 2013 as listed by the Applicants ranging from allocation of an office to the Applicant and giving him work to do, preventing him from attending councils meetings and sending him on leave until further communication are worth examination.

50. The Respondents submitted at length that the Applicants' position ceased to exist after the Universities Act came into force on 13/12/2012. That this Act failed to provide for the position of Deputy Principal Academic Affairs.

51. The Applicants on their part submitted otherwise. According to the Universities Act 2012; at Section 76:-

"(1) ----------

a. ***Any person who immediately before the commencement of this Act is a Vice Chancellor of a Public University or Principal of a Constituent College of a Public University shall remain in office for the remaining period of his or her term of office.***

b. ***All Councils of Public Universities in existence immediately before the commencement of this Act shall remain in office for a period not exceeding six months after which new councils shall be appointed under this Act".***

52. Section 81(1) of the same Act also saves all acts, directions, orders, appointments etc made under

the repealed Acts.

53. My reading of the law is that the appointment of the Applicant was saved by Section 76 of the Universities Act for the remainder of his term of service. In this case being a contract to run from 20th September 2010 depending on the date of reporting for a period of 5 years. This fact is exemplified in his appointment as Ag. Deputy Vice Chancellor on 30/5/2013 after the Universities Act came into force. This implies that the appointment of the Applicant as Deputy Principal Academic Affairs was to run in that capacity until a substantive appointment is made but without interfering with his part of the contract. This non-interference will mean that he would continue discharging his duties as usual and retain his office.

54. However the Applicant has averred that he was denied an office and also prevented from attending a Council's meeting on 30th August 2013. The submissions by the Respondent that the Applicants' position ceased to exist after the Universities Act came into force is to miss the point.

55. Section 23(3) (c) of Cap 2 states as follows:

"(3). Where a written law repeals in whole or in part any

other written law, then, unless a contrary intention

appears, the repeal shall not:-

1. ----------
2. ----------
3. ***Affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed".***

56. A repealed Act does not necessary become obsolete just because a new one has come in force and all rights accrued under the repealed Act will continue to exist as appropriate.

57. That being the position, the act of denying the Applicant an office and refusal to allocate him work was in breach of his contract of service. It is true that the Applicant was aware of the appointment of a new office bearer and he did hand over to the new Vice Chancellor Academic Affairs. He however sought a way forward concerning the remainder of his contract period which the Respondents didn't seem to reply to as per his Appendix MSN 7 dated 26/8/2013. He then came to court to seek preservation of his rights under the contract of employment and he got a reprieve on 29/8/2013.

58. The Respondents having been served with the order of the Court should have allowed him access to his office and allow him some duties. In ***Spoke v Banbury Board of health, Wood V.C*** said:

"The simple and only view is that an order must be obeyed". That those who wish to get rid of that order must do so by the proper course, an appeal. So long as it exists the order must be obeyed, and obeyed to the letter".

59. This same view is shared by J. M. Paterson in his book the 6th Edition of Kerr on Injunction in which he had this to say at page 668:-

"An order for an Injunction must be implicitly observed and every diligence must be exercised to obey it to the letter. However, erroneously or irregularly obtained, the order must be implicitly observed so long as it exists. A party effected by court cannot disregard it or treat it as a nullity but have it discharged on a proper application."

60. In **Stancmb v Trowbrudge UDC, Warrington J** stated:

"If a person or corporation is restrained by Injunction from doing a particular act, that person or corporation commits a breach of the Injunction, and is liable for a process for contempt, if he or it in infact does the act, and if it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order".

61. It is this court's finding that the Respondent indeed committed acts of contempt of this court's orders of 29/8/2013 by denying the Applicant access to his office and by not allowing him work based on the erroneous interpretation of the law that his office became obsolete notwithstanding the transition clause that saved his office from cessation.

62. The Respondents had submitted that they actually allowed the Applicant to continue in his office by paying his salary todate. That in itself is not the same as putting him in the position the court ordered as it is still contemnable not to have allocated him office space and allowed him to work. That, settles the 2nd issue.

63. Having found that the Respondents committed acts of contempt, it is this court's finding position that contempt must be punished. In the case of ***Johnson vs Grant 1923 SC 789 at 790 Lord President Clyde*** stated:

"—the law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged".

64. In the case of **Teachers' Service Commission Vs. Kenya National Union of Teachers and 2 others (2013) eKLR.** Hon. J. Ndolo alluded to this same position and cited ***Johnson v Grant*** stating:

"A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues of challenging it are also set out in the law. Defiance is not an option".

65. I agree with the stated position and dare add that. It is not an option to ever refuse to obey it by stating that the Applicant had mislead the court and failed to be candid with the court at the time of obtaining the order. It will be in interest of justice and the rule of law that the Respondents should have obeyed the order and then question its viability later.

66. Having found as above, I find that he Respondents are guilty of contempt of court as sited and must therefore be punished accordingly.

Read in open Court this 20th day of August, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Dr. Kamau Kuria for Applicant

Nyairo for Respondents