

REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2292 OF 2014

**WILLIAM MALII MWANZIA.....CLAIMANT/
APPLICANT**

VERSUS

**GENERAL MOTORS EAST AFRICA
LIMITED.....RESPONDENT**

RULING

1. The Claimant/Applicant through the Notice of Motion Application dated 17th June 2015 seeks committal of the alleged contemnor for refusal to allow the Claimant to resume his duties as ordered by the Court on 4th March 2015. The Claimant's application was supported by affidavit of Elijah Otieno Awach and the grounds on the face of the motion. The Respondent was opposed and filed affidavits sworn by the alleged contemnor Rita Kavashe, Fred Wasike, Mark Omuga, Alice Lukalo and Linda Njiru. The affidavits detailed in detail the various roles each of the officials had played in the matter.
2. The application was urged by Mr. Mageto for the Claimant/Applicant while Mr. Kemboy opposed it on behalf of the Respondent. Mr. Mageto submitted that the alleged contemnor had declined to allow the Claimant resume duty as ordered by the Court and that that in view of the contempt by the alleged contemnor it was proper for her to be cited for contempt and ordered to serve a sentence and the property of the Respondent attached and sold for the breach of the law. Counsel submitted that the alleged contemnor was personally served as deposed by the process server Peter Muendo Keli in his affidavit of service sworn on 7th February 2015 and 8th May 2015. The Claimant's counsel submitted that her failure to comply with the court order was punishable by this Court to ensure the dignity of the Court is protected. He thus urged that the orders sought be granted and the property of the Respondent be attached and sold to settle the arrears of salary due to the Claimant.
3. Mr. Kemboy was opposed and submitted that the application was not merited as the Court had not been moved properly. He submitted that the contempt application was filed without seeking leave of the Court as provided for under the Judicature Act. He submitted that notwithstanding, the Claimant was undeserving of the grant of the orders as he had not reported to work as alleged. He submitted that in addition the alleged contemnor was not served as deposed by the process server and that the process server had lied on oath. He submitted that the orders were served on other officials of the company who had deposed affidavits and confirmed their signatures on the orders and pleadings served. The Respondent had confirmed halting the retirement process as ordered by the Court in compliance with the Court order. He thus sought dismissal of the application with costs and sanction to the process server for swearing a false affidavit.
4. In his reprise, Mr. Mageto submitted that the contempt had not been purged and the alleged contemnor had failed to attend Court. He urged the Court to ignore the invitation to sanction the process server and strike out the affidavits of Linda Njiru, Mark Omuga, Alice Lukalo and Fred Wasike as the contempt application was directed at a specific person who was to respond to it.

5. As regards the filing of contempt applications, it is amply clear from precedent from the Court of Appeal that knowledge of the order and willful disobedience suffice for contempt of court to be founded. Refer to **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** one of the latest offerings of the Court of Appeal on the subject. In a well reasoned judgment, the Court of Appeal (Karanja, Mwera & Mwilu JJA) held as follows We reiterate here that Court orders must be obeyed. Parties to whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather it is mandatory and a person does not chose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said “no man is above the law and no man is below it; nor do we seek any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”
6. The Court of Appeal is spot on. No Court can sit helplessly while its orders are disobeyed. On the other hand, no Court order seems to have been breached by the Respondent which has confirmed halting the retirement process awaiting the final order of the Court in the matter. The Claimant has been exposed as a person who failed to appear at work save for visits on 12th March 2015 and 22nd May 2015 way past office hours and on the second occasion his visit was to deliver a letter from his lawyer. He thus cannot claim there was breach of the order to permit him to resume his duties. How can the Respondent or its servants be guilty of disobedience of the Court order if he does not report to work? He is not therefore entitled to have the Respondent’s property attached and sold to pay his salary arrears. He has absconded from work and there cannot be any pay for no work done. That would amount to theft.
7. The process server lied that he served the alleged contemnor Rita Kavashe. Alice Lukalo received the order of 30th March 2015 on 28th April 2015. She signed at the bottom and confirms this in her affidavit sworn on 15th July 2015. Mark Omuga received the order of 23rd December 2014 on 24th December 2014. He accepted service and signed on the bottom right hand corner of the order. It was therefore false to suggest that the orders were personally served on the alleged contemnor and that she received them and acknowledged service by signing and stamping on them. The process server Peter Muendo Keli is guilty of contempt of Court due to perjury. I will hear his mitigation before passing a sentence.
8. Parties are reminded of the dicta of the Court of Appeal cited above. No one is above the law and should circumstances reveal contempt of Court the Courts will not hesitate to punish for contempt should it be the process server, the lawyer or even the parties in the dispute.

Orders accordingly.

Dated and delivered at Nairobi this 3rd day of **August** 2015

Nzioki wa Makau

JUDGE