



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1663 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th October, 2015)

WILSON K.C. SHOLLEI.....CLAIMANT

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION..... RESPONDENT

RULING

1. The Application before court is a Notice of Motion dated 3rd February, 2015, seeking for orders:
 1. *That this Application be certified as urgent and be heard ex-parte in the first instance due to the urgency of the relief sought herein.*
 2. *Beatrice Sungura Nyabuto, who was at all material times the acting CEO/Commission Secretary of the Respondent, Ahmed Isaack Hassan, Lilian Bokeyee Mahiri-Zaja, Albert Camus Onyango Bwire, Kule Galma Godana, Amb. Yusuf A. Nzibo, Eng. Abdulahi Sharawe, Thomas Letangule, J. Muthoni Wangai, and Mohammed Alawi Hussun ALL Members of the Respondent be committed to Civil Jail for six months or such other or further period as this Honourable Court shall deem fit for Contempt of Court.*
 3. *The Court grant the Claimant/Applicant leave to effect service of this Application by substituted service through a newspaper with national circulation in Kenya.*
 4. *Such other or further orders as the Court may deem fit to grant.*
 5. *The Respondents pay the costs of this Application.*
2. The Application is supported by the grounds that:
 1. *Vide an Order delivered by the Hon. Lady Justice Maureen Onyango on 18th November, 2014, this Honourable Court declared the Termination of the Claimant/Applicant by the Respondent null and void and ordered the Status quo to be reverted to.*

2. The said Order was made in open Court in the presence of the Respondent's Advocates on record Mr. Mogere instructed by the firm of Mohammed Muigai Advocates.

3. The Order was served on the Respondent on 13th January, 2015, and further brought to the attention of the Chief Executive Officer/Commission Secretary and the Commissioners via letters dated 21st January 2015.

4. To date the said Order has not been complied with.

5. It is in the interest of justice and for the upholding of the dignity and authority of this Honourable court that the Applicant be granted the Orders sought herein.

3. The Application is further supported by the Affidavit of Wilson K.C. Shollei sworn on 3rd February, 2015.

4. The Claimant in his submissions states that there is an Order issued by Onyango J. on 18.11.2014 that declared termination of the Claimant null and void and ordered that the status quo be reverted to. The Status quo was that the Claimant was a supervisor on ½ pay pending determination of anti-corruption charges. That an order was made in open Court in the presence of the Respondent's Advocate Mr. Mogere instructed by the firm of Mohammed Muigai Advocates.

5. The Respondent refused to comply with the Order for reinstatement of the Claimant on the payroll. The Respondent continued to withhold his salary and salaries for November and December, 2014, and January 2015. On 21.1.2015, the Claimant wrote to the Respondent asking them to comply but they failed to do so. The Order was brought to the attention of all the Respondent's Commissioners by serving it at their mailing office.

6. The Court was then moved *vide* a Miscellaneous Application No. 8 of 2015 which was dismissed and the Court directed it be filed in the main suit. To date the Respondent has not complied with the Order. The Claimant urges the Court to protect the rule of law and relies on the case of **Africa Management Communicational International Limited Vs Joseph Mathenge Mugo & Another (2013) eKLR.**

7. According to the Applicant, the Replying Affidavits filed by the proposed contemnors; all of them at paragraph 3 of their Affidavits admit being aware of the Court Order issued on 18.11.2014. The Respondents all claim that the Order was not personally served upon them but the Claimant/Applicant states that this is an attempt to avoid responsibility. The Claimant relies on the case of **Shimmers Plaza Limited Vs National Bank of Kenya Limited Civil Appeal 33 of 2012** which addresses the issue of where an Order is made in the presence of an Advocate. The Respondent even went ahead to appeal against the Ruling on 2nd December, 2014, of Onyango J which goes to show that they were aware of the Court Order.

8. The Claimant refutes the proposed contemnors assertion that they are not involved in the day to day running of the Respondent and that it is not true that the Secretariat communicated the Order of the Court to them and they failed to obey and that is just an attempt to avoid responsibility to obey the Court Order. The Claimant seeks for the Application to be allowed as prayed.

9. The Respondent opposed the Application and filed Affidavits by each of the proposed contemnors. Eleven (11) Affidavits were filed by the Respondents; nine (9) by the IEBC Commissioners and two (2) by Ezra Chiloba and Beatrice Nyabuto Sungura.

10. The Respondent posed the question; what is contempt of Court? They relied on the definition in Black's Law Dictionary which defines it as disobedience of a Court Order issued by a Judicial Body.

11. In this case, Onyango J gave Orders on 18.11.2014 to the effect that the Claimant's termination was

declared null and void and declared the status quo before the termination of employment to prevail. The Order didn't specify the time frame within which the Order was to remain. The effect was that the Claimant was to continue receiving his half salary which had been stopped. It is not in dispute that he has been receiving half pay from February, 2014.

12. It the Respondent's contention that on 3.02.2014 the claimant received the Orders of reinstatement and he was ordered to serve the Respondents by substituted service. The Notice appeared in the East African Standard on 5th March, 2015. As at this date, the payment had already been effected and there was no substantive Order of the Court that had been disregarded willfully.

13. The Respondent urges the Court to take judicial notice of the fact that government financial expenditure is subject to an elaborate process and in the absence of a competent officer the Order was not capable of being complied with.

14. The Respondent further states that the Application is defective as it seeks to cite commissioners of IEBC for contempt. Section 5(4) of the IEBC Act defines functions of commissioners and states that the person responsible for day to day running of the IEBC and execution of Court Decree is the Secretariat headed by the CEO.

15. The Respondent prays that the Application as against the chairman and other commissioners be declared incompetent and it should be struck out. That the purpose of the law of contempt is not to preserve the dignity of the Court but to ensure the law is observed. The Respondents allege that they have complied with the Court Order. The Respondent is of the view that the Authorities cited by the Claimant/Applicant have no relevance to the present case.

16. The Claimant in response to the Respondent's submissions stated that by the time they moved the Court on 2.2.2015 and on 4.2.2015 the Respondent had not complied with the Court Order. The Claimant also states that in the absence of a substantive CEO, the commissioners ought to have complied with the Court Orders but in the present case there was an acting CEO one Beatrice Sungura. On the submission that the Application is incompetent; everyone should comply with a Court Order. That the Respondent should stop hiding behind the IEBC Act since the Order was issued in the presence of the Respondent's Advocate.

17. Having considered submissions by both parties, the issues for determination are as follows:

1. ***Whether the IEBC Chairman and Commissioners are rightly cited for contempt in this Court.***
2. ***Whether the order said to have been flouted was served on Respondents.***
3. ***If so whether Respondents committed any acts of contempt or disagreed to the said order.***
4. ***What orders to give in the circumstances?***

18. On the 1st issue, the Respondents have submitted that under Section 5(4) of IEBC Acts, the function of the Commissions have been stated as follows:

“The Chairperson and members of the Commission shall perform their functions as provided in the Constitution and the Secretariat shall perform the day today administrative functions of the Commission”.

19. The administrative functions of the Commission will include payment of salaries of staff and the day to day running of the functions of the Commissioner which role does not include the constitutional mandate of the Commission to oversee referenda and elections in the country.

To ask the Commissioner to personally ensure that the Applicant's status quo was reinstated, would be to ask them to perform duties of the Secretariat.

20. It has been argued that there was no substantive Chief Executive Officer in office and so the Commissioners should have ensured implementation of the court order. It is however this Court's view that the Ag Chief Executive Officer was in office and it was her duty and mandate to ensure compliance of the court order.

21. This Court finds that the Chairman and Commissioners are improperly enjoined and cited for contempt in this case and the application against them is dismissed accordingly with costs.

22. On the 2nd issue, the issue of service of the order given by J. Onyango is clear that the order was given in presence of Counsel for Respondents. That this order came to the notice of the Respondent is evidenced by the Respondents decision to appeal the decision.

23. The office responsible for implementing the Court's decision was the office of Chief Executive Office who has sworn affidavit filed in Court and in her replying affidavit filed in Court on 31/3/2015 paragraph 3 she depones that she is aware of the order given by J. Onyango in her ruling on 18/11/2014. She further depones that the order of the Court was complied with and that the Claimant received his withheld salary of Kshs.2,562,500/= and will continue to receive ½ salary on monthly basis until further order of the court.

24. It is the view of the Court that the Claimant having been paid his withheld salary and the Respondent promising to pay his ½ salary until further order of the Court, the would be contempt has been purged and the application compromised to some extent.

25. The Respondents have explained the delay in paying out the moneys as directed by Court given the laborious and chequered manner for having paying from public funds.

26. I therefore find that, the would be contemnor the then Ag. Chief Executive Officer of Respondent did purge the contempt and I do not find any other contempt of this Court's order pending. I therefore dismiss this application for contempt. Each party will bear its own costs.

Read in open Court this 14th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Sifuna for Applicant

No appearance for Respondents