



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR RELATINS COURT AT MOMBASA

CAUSE NO. 262 OF 2014

KELVIN KIGEN KIETICLAIMANT

VERSUS

KILIFI COUNTY PUBLIC SEVICE BOA1ST RESPONDENT

MATANO RIZIKI CHONGA2ND RESPONDENT

OWEN YAA BAYAINTERESTED PARTY

RULING

INTRODUCTION

1. On 12.6.2014, this court gave temporary order restraining the 2nd respondent from taking over the position of Head of Supply chain Management for the 1st respondent pending inter-partes hearing of the application for interlocutory injunction. The said order remained in force until 11.7.2014 when the court allowed the said application and directed that the claimant and the 2nd respondent to retain their offices of Interim Head of Supply Chain Management and deputy respectively, pending the hearing and determination of the suit.
2. The suit came up for hearing on 26.8.2014 when the claimant gave his evidence in chief during which complained that the aforesaid court orders were being breached. The alleged contempt was not done in the face of the court and as such the court directed the claimant to move the court formally for contempt. Hence the present Amended Notice of Motion dated 4.9.2014 which seeks the following orders:

(i) That Mr. OWNEN YAA BAYA being the County Secretary and Head of Public Service of the Kilifi County Government be committed to a civil jail for a term not exceeding six (6) months and/or his moveable property be attached for disobeying and deliberately breaching the terms of the interim order of injunction initially granted on 12th June 2014 and further orders of 11th July,2014 and extended in their presence and/or that of their counsels on the same date.

(ii) That Mr. MATANA RIZIKI CHOGA being the deputy Head of Supply chain Management ,(as per the order of this Honourable court dated 11th July 2014), be committed to a civil jail for a term not exceeding six (6) months and/or his movable property be attached for disobeying and deliberately breaching the terms of the interim order injunction of court granted on 11th July 2014 and extended in their presence and/or that of their counsels on the same date.

3. The grounds upon which the Motion stands are that on 12.6.2014 this court made injunction orders restraining the removal of the claimant from office of Head of Supply Chain Management and taking over of the said office by the 2nd Respondent. That the order was served on the respondents herein but they disobeyed the same by sending the claimant to a compulsory leave pending the outcome of the suit herein and by the 2nd respondent taking over the office of the Head of Supply Chain Management.
4. In addition the claimant has averred that on 11.7.2014 that the court made further orders that the claimant and the 2nd respondent shall continue to hold the office of Head of Supply Chain Management and deputy respectively on the interim basis pending hearing and determination of the suit but again the respondents herein disobeyed the said order. That on 12.8.2014 Mr Owen YaaBaya (Interested party) convened a tender committee and invited the 2nd Respondent to attend as the secretary, a position reserved only for the Head of the Supply Chain Management, in this case the claimant. That the 2nd respondent has since the date of the said orders been performing the duties of the Head of Supply Chain Management, which duties are reserved for the claimant. The Motion is supported by the supporting affidavit sworn by the claimant on 4.9.2014.
5. The 2nd Respondent and the interested party have opposed the Motion through a Notice of Preliminary objection (PO) and affidavits dated 22.9.2014. The gist of the Preliminary Objection and the replying affidavit by the Interested Party is that he is not a party to the suit and as such the orders made by the court did not apply to him.
6. The 2nd Respondent has on the other hand prayed for the motion to be struck out for failure to comply with section 5 of the Judicature Act both in form and substance. In addition he has denied ever assuming the office of the Head Supply Chain Management in the 1st Respondent and maintained that he has at all material times complied with the court order by working as the interim Deputy to the Head of Supply Chain Management for the County Government of Kilifi and as directed by the interested party herein. He deposed that on 11th and 12th August, 2014 he was invited to sit in the tender committee as the secretary by the Interested Party because the claimant was absent from office. He maintained that the claimant had not been removed from office as the interim Head Supply Chain Management for the County Government of Kilifi and that he was still enjoying his full pay.
7. The motion was heard orally on 16.7.2015 when Mr Adhoch learned counsel represented the Claimant while learned counsel Mr. Muthama and Mr. Kithi represented the 2nd respondent and the interested party respectively.

ANALYSIS AND DETERMINATION

8. There is no dispute that this court made orders against the respondents in the suit on 12.6.2014 and 11.7.2014 respectively. There is also no dispute that the respondents to this motion were either served with the said orders or became aware of the same. The issues for determination herein are :
 - a. whether the court lacks jurisdiction to entertain contempt of court proceedings.
 - b. whether this motion is incompetent for failing to comply with section 5 of the Judicature Act.
 - c. whether the motion is incompetent for seeking orders against a third party.
 - d. whether the amended motion is incompetent for want of leave to amend.
 - e. whether the respondents to the motion have disobeyed the court orders dated 12.6.2014 and 11.7.2014.
 - f. whether the 2nd respondent and the interested Party should be punished as prayed.

Lack of jurisdiction

9 Mr. Kithi, counsel for the interested Party submitted that this court lacks jurisdiction to punish anyone for contempt of court. According to him the Industrial Court Act limits this court's jurisdiction to determining employment disputes only. That there exists no contract of employment between the claimant and the County Government of Kilifi or the 1st respondent because the claimant is only working for the County government on secondment from the Public Service Commission. In reply Mr. Adhoch, counsel for the claimant submitted that the claimant was in an employment relationship with the

respondents herein and that is why the interested Party send him on compulsory leave vide letter dated 16.6.2014.

10 This court has no difficulty in finding that it has the jurisdiction to punish for contempt of court just like its equal, the High court under the Judicature Act and also under the Employment and Labour relations Court Act (ELRCA). Article 162 (2)(a) of the Constitution and section 12 of the ELRCA gives this court jurisdiction to determine disputes related to employment and labour relations. In this case the claimant is rendering employment services to the county government of Kilifi on secondment from the Public Service Commission (PSC). The dispute touches on employment relationship which existed between the parties herein before the conservatory orders were made to protect it.

11 On the other hand the said Article 162 of the Constitution gives this court equal status with the High Court. It can therefore punish for contempt in the same manner as the High Court under section 5 of the Judicature Act and section 63 of the civil Procedure Act (CPA). Section 7 (1) of the sixth schedule to the constitution provides that:

"all laws in force immediately before the effective date shall continue in force and shall be construed with alterations, adaptations qualifications, and exceptions necessary to bring it into conformity with this constitution."

In view of the foregoing provision the court construes High Court under section 5 of judicature Act to include court with equal status with the High court. Consequently the court finds that it is well seized of the jurisdiction to entertain the motion herein.

12 In addition to the foregoing the orders in issue are injunction orders which are enforceable under the rules applicable to the High court within the meaning of rule 31(2) of the Industrial court Procedure Rules of 2010 (ICPRs). Consequently contempt of court order application in respect of Breach of injunction order like in the present motion, can competently be entertained by this court if it is brought under section 63(c) of the civil Procedure Act (CPA) and Order 40 rule 3 of the Civil Procedure rules (CPRs)

Breach of section 5 of the Judicature Act.

13 The 2nd respondent alleged in paragraph 2(h) of his replying affidavit that the motion herein does not comply with mandatory provisions of section 5 of the said Act, both in form and substance. No submissions were made to support that point during the hearing and as such the court treats it as abandoned . However, in view of the findings made above, the claimant can move the court under the Judicature Act or the Civil Procedure Act or just section 12 (3)(viii) of the ELRCA.

whether third parties can be cited for contempt

14 The 2nd respondent and the Interested party objected to the motion on ground that he was not a party to the suit from which the contempt proceedings arise and as such he could not competently be cited for contempt of orders which were not directed at him. Their respective counsel, however, never submitted on the said P.O. during the hearing of the motion. The court has however considered that P.O and found no merits in it in light of the existing judicial precedents cited by the claimant among others.

15 In ***HCCC 154 of 2014 Eliud Muturi Mwangi vs LSG Lufthansa Services Europa/africa GMBH and another, HCCC302 of 2004 gatimu Farmers Company vs Geoffrey Kagiri and 2 others*** and ***C.A.No.33 of 2012 Shimmers Plaza Ltd vs National Bank of Kenya Ltd*** the courts held that court orders must be obeyed by all the persons who become aware of them whether or not they are parties to the suit. It is now trite law that if any person has knowledge of a court order and willfully or deliberately disobeys it, he can be cited and punished for contempt whether or not, he is a party to the suit.

Incompetence for want of leave to amend.

16 The 2nd respondent raised a P.O to the Notice of motion during the hearing on the ground that the amendment was done without leave of the court. Mr. Muthama for the 2nd respondent submitted that the a Notice of Motion is not a primary pleading like a plaint for purposes of amendment without leave of the court. He relied on *Hccc No 469 of 2008 Avanti ltd vs Jaswant Vohora [2008] eKLR* where the court held that an amended Notice of Motion filed without the leave of court was incompetent and proceeded to strike it. Mr Adhoch for the claimant responded that a contempt application is equivalent to a fresh pleadings and can be amended without leave of the court before service. He however did not cite any law or judicial precedence to support his contention in this court.

17 This court is alive to the fact that it has a constitutional mandate Article 159 of the constitution to give priority to substantive justice over the procedural technicalities. The respondents have not demonstrated any prejudice that has been occasioned by the disputed amendment. They have all been able to file replying affidavits and P.O on other grounds. The purpose of contempt proceedings is to protect the rule of law and to ensure that people obey the law. The need to promote obedience to law far outweighs the need to comply with procedural technicality. A proposed contemnor should not go free merely because the application for his punishment has a defect in its form. For the foregoing consideration this court has therefore excused the failure to seek leave before filing the amended motion dated 4.9.2014. Consequently and for the sake of substantive justice and the courts duty to sustain proceedings as much as possible, the Persuasive decision in *Hccc No 469 of 2008 Avanti ltd vs Jaswant Vohora [2008] eKLR* is not going to apply to this case.

Disobedience with court orders dated 12.6.2014 and 11.7.2014

18 The claimant contents that the Interested party disobeyed the order dated 12.6.2014 and 11.7.2014 while the 2nd respondent disobeyed the latter order. The order dated 12.6.2014 stated as follows:

"A temporary order of injunction is hereby issued restraining the 2nd respondent from taking over the position of the head of the Supply chain Management for the Kilifi Service Board pending the hearing and determination of the this application inter-partes"

19 The order dated 11.7.2014 is contained in this court's ruling delivered on the same day in the presence of counsel for the parties to the main suit. The court stated as follows:

"the application dated 11.6.2014 is allowed in terms of prayer 4, 5 and 6. The effect of this ruling is to retain the claimant, as the Head of Supply Chain Management for the Kilifi County while the 2nd respond shall remain his deputy, with full benefits until this suit is heard and determined."

20 The Interested party being the Head of the Civil Service in Kilifi County, learned about the order of the court dated 12.6.2014 and in reaction to the same wrote a letter to the claimant , thus:

"Date: 16th June, 2014

Mr. Kevin Kigen kieti

Supply Chain Management

county Government of Kilifi

KILIFI

RE: LEAVE

It has come to my notice that you have filed an injunction which was granted by the court against the County Public Service Board and one Riziki Chonga from taking over the as the Head of Supply chain Management. I hereby direct that that you proceed on 30 days leave or until the determination of the

court case whichever comes first.

I direct that you handover all documents, items and all other county government assets in your possession to the Chief Officer of Finance Mr. Benjamin Kai Chilumo or his appointed Officer on or before the close of business today 16th June, 2014 and thereafter proceed on leave.

OWEN YAA BAYA

COUNTY SECRETARY

OYB/jkm

CC: Chief Officer-Finance"

21 On 12. 8. 2014 the interested Party wrote another letter part of which stated as follows:

"TO:

Mr. charo kennth Kazungu -	Chairman
Mr. James Kapanya Nguzo-	member
Ms. Patience Umazi Simba-	Member
Mr. danielBaha Nguma-	Member
Mr. Samuel Kombe Ngari-	Member
Mr. Makoti Andrew Makonde-	Member
Mr. Emanuel Katana Joseph-	Member
Mr.Mohamed Sila Chuba-	Member
Joseph Malenga Waema-	Member
Dr. Timothy Koe Malingi-	Member
Mr. Matano Riziki-	Secretary

FROM: COUNTY SECRETARY

RE: INVITATION YO ATTEND TENDER COMMITTEE MEETING

You are invited to attend a tender committee meeting scheduled to be held at the office of the Deputy Governor in the Conference Room on Tuesday 12th august 2014 starting at 2.30p.m.

The Agenda will be...

Please be punctual.

OWEN YAA BAYA

COUNTY SECRETARY AND HEAD OF THE PUBLIC SERVICE.

MRC/fdm

22 In his defence, the interested party swore replying affidavit saying that he was not a party to the suit as such he could not be cited for contempt of court. He did not show any remorse to this court for writing the letters stated above. The court has already found that the interested party was aware of the order of this court dated 12.6.2014 but disobeyed it by ordering the claimant to go on an wanted leave for 30 days or until this suit was over. He also directed the claimant to hand over all documents and the property of the County government of Kilifi which were in his possession before going as if he had been dismissed. As the Head of the Public service in the Kilifi County , the interested party had no legal right to interfere with the said public service or position of any officer after the court had ordered for the status quo to be maintained.

23 Even if the interested party had no respect to the person who gave the injunction order, he has a legal obligation to obey the law of the land and to uphold the dignity of the court. His obedience to the court order was not an option but a duty because the law requires that court orders must be obeyed. Without obedience to Court Orders, there would be no rule of law and such the country would fall into anarchy. For that reason persons who disobey court orders must be punished in order to protect the law uphold the dignity of the institution of the Judiciary. For the reasons stated above the court finds beyond reasonable doubt that, the interested party, Mr Owen Yaa Baya has deliberately disobeyed and violated this court's order dated 12.6.2015.

24 As regards the order dated 11.7.2014, the interested Party was never served with the same and there is no evidence to prove that he became aware of the same. Save for the allegation by the claimant that the respondents counsel was present in court on 11.7.2014 when the ruling was delivered, there is no evidence that an Order was extracted and served on the interested party. It is clear from the record that the interested party was not a party to the suit and was not personally in court or represented there by any counsel on 11.7.2014. In that respect the court will not cite him for contempt for writing the letter dated 12.8.2014.

25 On the other the 2nd respondent was accused of disobeying the order made on 11.7.2014 by performing all the duties of the Head of Supply Chain Management including sitting as the secretary for the Tender Committee of the Kilifi County Government on 12.8.2014. In his defence, he deposed in his replying affidavit that he has only been serving as the deputy to the Head of supply Chain Management in compliance with the court order and the direction of the County Secretary. The court, however, reads mischief and believes that the 2nd respondent was the author the letter dated 12.8.2014, considering the initials "*MRC/fdm*" at bottom of the letter.

26 The foregoing notwithstanding, the contention that the claimant was absent on 12.8.2014 when the tender committee sat was not denied by the claimant by way of affidavit. The burden was upon the claimant to prove that he was present at work or he was prevented from going to work by the respondents and the interested party in order for the 2nd respondent to take over his office and the functions of the Head of Supply Chain Management. That burden of proof was not discharged and as such the 2nd respondent is not cited for contempt of court because, as deputy to the claimant he was legally permitted to act as the secretary of the Tender Committee whenever the claimant was absent.

Disposition

27 For the reasons stated above, the amended notice of motion is partially allowed to the extent that the interested party, Mr. Owen Yaa Baya is cited for contempt of this court's order dated 12.6.2014 and consequently he is ordered to attend court personally on 12th October 2015 at 9.00 am to show cause why he should not be punished.

It is so ordered.

Signed, dated and delivered at Mombasa this 7th day of October 2015.

ONESMUS N. MAKAU

JUDGE

7.10.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

ONESMUS MAKAU

JUDGE