



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1539 OF 2013**

**PROF. FRANCIS M. NJERUH ..... CLAIMANT**

*VERSUS*

**PROF. MABEL IMBUGA ..... 1<sup>ST</sup> RESPONDENT**

**DR. EKURU AUKOT ..... 2<sup>ND</sup> RESPONDENT**

**DR. ROSE MURAGURI - MWOLOLO ..... 3<sup>RD</sup> RESPONDENT**

**MS. BERTHA DENA ..... 4<sup>TH</sup> RESPONDENT**

**AMB. STEVEN LOYATUM ..... 5<sup>TH</sup> RESPONDENT**

**DR. KHADIJA SOOD SHIKELY ..... 6<sup>TH</sup> RESPONDENT**

**ENG. JOHN TANUI ..... 7<sup>TH</sup> RESPONDENT**

**MS. FENNY MWAKISHA ..... 8<sup>TH</sup> RESPONDENT**

**DR. JANE NGETHE ..... 9<sup>TH</sup> RESPONDENT**

**MR. CHRISANTOSE ODHIAMBO ..... 10<sup>TH</sup> RESPONDENT**

**RULING**

1. Application dated 27<sup>th</sup> August 2014 was certified urgent and leave granted to apply for an order that Prof. Mabel Imbuga, Dr. Ekuru Aukot, Rose Muraguri – Mwololo, Ms Bertha Dena, Amb. Steven Loyatum, Dr. Khadija Sood Shikely, Eng. John Tanui, Ms Fenny Mwakisha, Dr. Jane Ngethe and Mr. Chrisan tose Odhiambo be committed to jail for six (6) months for contempt of Court.
2. That the Respondents be compelled to obey the orders made herein on 21<sup>st</sup> January 2014 and 9<sup>th</sup> May 2014.
3. That it be declared that purported recruitment proceedings held on 17<sup>th</sup> July 2014 are null and void.
4. That an injunction be granted to restrain the 1<sup>st</sup> to 10<sup>th</sup> Respondents from taking any further steps whatsoever to fill the positions, of Deputy Vice Chancellor (Finance) and Deputy Vice Chancellor

(Administration)

5. That the orders the Respondents have disobeyed were made by this Court on 21<sup>st</sup> January 2011 and 9<sup>th</sup> May 2014 respectively as follows;

*“that the Respondent be and is hereby restrained by itself, its servants and or agents from recruiting a person to fill the Claimant / Applicant’s post of Deputy Vice Chancellor (Administration, Planning and Development until the hearing and determination of this application or further orders of this Honourable Court.”*

6. On 9<sup>th</sup> May 2014 Hon. Mbaru further directed;

the Respondent, Prof. Mabel Imbuga as the cited contemnor do pay a fine of Kshs.500,000/= (Five Hundred Thousand Kenya Shillings) for contempt of Court or in default, be committed to Civil Jail at Nairobi Women’s Prison for thirty (30) days.

7. That the Respondent Prof. Mabel Imbuga as the contemnor was ordered to forthwith and with immediate effect purge the contempt of Court.

8. The 1<sup>st</sup> Respondent paid the fine of Kshs.500,000/= and obtained her liberty. However the Applicant alleges that she committed further contempt by disobeying the 2<sup>nd</sup> limb of the order of 9<sup>th</sup> May May, 2014 by completely refusing to purge the contempt of Court. On 7<sup>th</sup> February 2014 the University had advertised the post of Deputy Vice Chancellor (Finance) and on 11<sup>th</sup> April 2014, had advertised the post of Deputy Vice Chancellor (Administration) which officers will undertake the responsibility of the Claimant as per his letters of appointment.

9. That the advertisements were in flagrant disregard and contempt of the Court order given on 21<sup>st</sup> January 2014 and led to the order for committal to prison of the 1<sup>st</sup> Respondent vide the committal order of 9<sup>th</sup> May 2014.

10. On 17<sup>th</sup> July 2014, the 1<sup>st</sup> Respondent further compounded the contempt of Court by holding interviews for the filling of the positions of Deputy Vice Chancellor (Finance) and also Deputy Vice Chancellor (Administration)

11. The object of the Respondent is to defeat the order which was made on 21<sup>st</sup> January 2014 and the contempt order made on 9<sup>th</sup> May 2014.

12. The Application dated 14<sup>th</sup> January 2014, pursuant to which interim orders of the same date were granted was heard and determined and on 28<sup>th</sup> March 2014, I made the following ruling *inter alia*;

*“with regard to the third preliquisite for the grant of a conservatory order, the Court observes that, the Applicant has rightly or wrongly been dismissed from his employment and a vacuum has been created in the position of the Deputy Vice Chancellor (Finance & Administration)  
.....*

*The Respondent is a public university with a very wide mandate to provide higher learning to thousands of university students in this country and the continued existence of this vacuum, which is likely to be prolonged indefinitely by a conservatory order of this Court, would be inimical to public interest as reflected in the Charter and the statute governing the operations of the Respondent to provide quality education to young adults in this country. In the final analysis, the Court observes the need for this matter to be heard and disposed of expeditiously for justice to be done and be seen to be done to the parties herein.”*

13. However, the Applicant points to the fact that, notwithstanding the interim orders of January 2014, the

alleged contemnors went ahead to advertise the post of Deputy Vice Chancellor (Finance) before the ruling of this Court made on 28<sup>th</sup> March 2014. That the act of advertising the post was in flagrant disregard of the orders of the Court made on 21<sup>st</sup> January 2014.

14. The advertisement for the post of Deputy Vice Chancellor (Administration) was done on 11<sup>th</sup> April 2014 after my ruling on 28<sup>th</sup> March 2014.

15. The originating Notice of Motion is supported by a statement dated 19<sup>th</sup> August 2014, a verifying affidavit sworn on 19<sup>th</sup> August 2014, a supplementary affidavit sworn on 25<sup>th</sup> August 2014 and a replying affidavit sworn on 31<sup>st</sup> October 2014.

16. The Applicant states that these affidavits and the statement have not been controverted by the Respondents through the affidavit of Dr. Ekuru Aukot sworn on 26<sup>th</sup> September 2014.

### **Replying Affidavit**

17. Dr. Ekuru Aukot, the Chairman of Council of the Jomo Kenyatta University of Agriculture and Technology, and the 2<sup>nd</sup> Respondent deposes that upon issuance of the order of 21<sup>st</sup> January 2014, the Council never held any interviews for the advertised positions at all.

18. That the application dated 14<sup>th</sup> January 2014 did not succeed upon inter-partes hearing and Justice Nduma J. issued a ruling on 28<sup>th</sup> March 2014, discharging the interim orders.

19. That the council had passed a resolution splitting the office of Deputy Vice Chancellor (Administration, Planning & Development) into 2 offices namely Deputy Vice Chancellor (Finance) and Deputy Vice Chancellor (Administration) after disengaging the Claimant on 9<sup>th</sup> January 2014.

20. That the process of filing the two (2) offices created only commenced after the ruling of the Court on 28<sup>th</sup> March 2014.

21. That recruitment process and interviews were duly held on 17<sup>th</sup> July 2014 accordingly.

22. That in obtaining leave to commence contempt proceedings against the Respondents, Claimant relied on an order which had lapsed after the injunction was denied by the Court.

23. That contempt proceedings have criminal sanctions attached to them and it is not fair and just to ground the same on an order of 21<sup>st</sup> January 2014 which had lapsed.

24. That contempt proceedings not properly grounded is in breach of the Respondent's constitutional rights.

25. That the process should not be used to humiliate and intimidate the Respondents.

26. That the same is premised on malice and ill will against the Council and Court process should not be used to settle personal scores.

27. That the Court should first interpret and define its order of 21<sup>st</sup> January 2014 and ruling of 28<sup>th</sup> March 2014, and should find that no contempt took place at all against the orders of the Court.

### **Issues for determination**

- i. Did the Respondents act in defiance of Court orders;
- ii. If the answer to (i) above is in the affirmative were the orders of the Court properly served on

them;  
iii. What remedy if at all is available to the Claimant / Applicant.

### **Issue i**

28. From the facts presented to the Court it is clear that the interim orders of the Court issued on 21<sup>st</sup> January 2014 were set aside by the Court in a ruling delivered on 28<sup>th</sup> March 2014.

29. It is true that on 7<sup>th</sup> February 2014, the date the post of Deputy Vice Chancellor (Finance), was advertised the interim orders issued on 21<sup>st</sup> January 2014 were in place.

30. The alleged splitting of the position previously held by the Claimant is a matter of evidence to be determined after hearing the main suit.

31. The interim orders of the Court cited herein before stopped the Respondent from filling the position previously held by the Claimant / Applicant being that of Deputy Vice Chancellor (Administration, Planning and Development).

*(emphasis mine).*

32. There is no evidence that any action was taken by the Respondents to fill the above said position while the interim orders of the Court issued on 21<sup>st</sup> January 2014 was in place.

33. Contempt proceedings are criminal in nature and the standard of proof to be discharged by the Applicant is beyond reasonable doubt. The Claimant / Applicant has demonstrated that during the pendency of the interim orders issued on 21<sup>st</sup> January 2014, and specifically on 27<sup>th</sup> February 2014, the position of Deputy Vice Chancellor (Finance) was advertised for filing.

34. It is not in dispute that interviews to fill that particular position commenced after the interim orders of the Court were discharged on 28<sup>th</sup> March 2014.

35. In Court's view the Claimant / Applicant has failed to demonstrate that the Respondents acted with intention to defeat the interim orders of the Court to fill the position of Deputy Vice Chancellor (Administration, Planning and Development). The answer to the question is in the negative.

### **Issue ii**

36. The Court need not address the second issue upon the finding that the Respondents did not intentionally act in defiance of a Court order.

37. The Court is in agreement with the finding in the case of **Johnson –vs- Gret, 1923 SC 787** cited in the case of **Teachers Service Commission –vs- Kenya National Union of Teachers and 2 others [201] eKLR** on the law of contempt;

*“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.”*

38. The Courts punish for contempt to safeguard the rule of law. The Court in the present case does not find that the 1<sup>st</sup> to 10<sup>th</sup> Respondents acted in blatant violation of the Court Order.

39. If it be said as alleged by the Applicant that the final recruitment of the Deputy Vice Chancellor (Finance) and Deputy Vice Chancellor (Administration) effectively pre-empted the filling of the position of Deputy Vice Chancellor (Administration, Planning and Development), that is a matter to be established upon hearing the full facts of this case and appropriate remedial orders are still available to the Claimant /

Applicant herein.

40. The Court believes just as was expressed in the ruling delivered on 28<sup>th</sup> March 2014, that this matter has protracted unnecessarily and the merits and demerits of this case should be gone into in the hearing of the main suit expeditiously.

41. In any event, to the extent the initial finding of contempt that was punished by Mbaru J. vide orders of 9<sup>th</sup> May 2014 was in respect of the advertisement of 7<sup>th</sup> February 2014 *vis a vis* the orders of 21<sup>st</sup> January 2014, which determination, the Court was entitled to, the matter is *resjudicata* and I do not find that subsequent conduct of interviewing and filling the positions of Deputy Vice Chancellor (Finance) and Deputy (Administration) was in violation of the Court orders of 21<sup>st</sup> January 2014, which I discharged in my ruling of 28<sup>th</sup> March 2014 and were therefore not in force as at the time the interviews were conducted and the positions filled.

42. We are persuaded by the finding in **Diasta Investments Limited –vs- Nitesh Devan Kiara Shah & 4 others [2014]eKLR** in which Hon. Lady Nyamweya observed;

*“consequently, if this Court wanted to save the orders given on 26<sup>th</sup> July 2011 or to order that a particular status quo to be maintained by the parties herein pending the compliance by the plaintiff with the Court’s directions, it would have expressly ordered so ..... I therefore find for the foregoing reasons that there is not subsisting order in force that can be the subject of the present application for contempt of Court .....*”

43. This situation appertains in the present case and for this and other reasons given hereinbefore, the Application is dismissed with costs.

**Dated and Delivered at Nairobi this 2<sup>nd</sup> day of November 2015**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**