



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1022 OF 2012

VINCENT EDWARD NJOROGI

PHILIP OPANGA OTENYO

RONALD KAMPA LUGABA

**(SUING ON THEIR OWN BEHALF AS WELL AS ON BEHALF OF OTHER EMPLOYEES OF
KENOL KOBIL LTD).....CLAIMANTS**

VS

KENOL KOBIL LTD.....RESPONDENT

RULING

Introduction

1. Following an application by the Claimants under certificate of urgency, the Court issued the following interim orders on 14th August 2012:
 - a. That the application dated 14th August 2012 be and is hereby certified urgent and heard *ex parte* in the first instance;
 - b. That the Respondents by themselves, their Managers, Directors and Agents be and are hereby restrained from terminating the services of the Claimants or in any other way interfering with industrial peace at the Company until this matter is heard *inter partes*.
2. Following an alleged disobedience of these orders, the Claimants were granted leave on 4th September 2012 to commence contempt of court proceedings against one David Ohana, the General Manager of Kenol Kobil Limited (the Contemnor herein).

The Application for Committal

3. Pursuant to the leave granted by the Court on 4th September 2012, the Claimants filed an application dated 10th September 2012 seeking the following orders:
 - a. That this Court finds and holds that the General Manager of Kenol Kobil Limited, David Ohana is in contempt of this Court's orders granted on 14th August 2012;

- b. That the Court be pleased to hold that as a consequence of his acts of contempt, David Ohana shall be detained in prison for a period of six months or such period as the Court may please;
- c. That this Court be pleased to nullify all decisions made by the General Manager, David Ohana while in contempt particularly between 14th August 2012 to the date of this application;
- d. That this Court may be pleased to grant such other orders and directions as may be appropriate in the circumstances;
- e. That the General Manager, David Ohana should be condemned to pay the costs of this application.

4. In a supporting affidavit sworn by Philip Otenyo Opanga on 10th September 2012, it is deponed that the orders of this Court dated 14th August 2012, together with the Claimants' application and notice of penal consequences were served upon Kenol Kobil Limited on 15th August 2012.

5. It is further deponed that despite having been duly served with the Court orders, the Respondent's General Manager, David Ohana willfully disobeyed the said orders by continuing to terminate the employment of employees without reasonable cause.

David Ohana's Reply

6. In submissions filed on 27th March 2014, it is submitted that the proceedings brought against David Ohana are a nullity as the Claimants are a large group of people and not all of them are named in the suit. It is in fact suggested that David Ohana himself who remains an employee of Kenol Kobil Limited would qualify as a claimant and the firm of Rachier and Amollo Advocates which acts for the Claimants lacks the legal capacity to act for David Ohana both as a claimant and a respondent in the same suit.

7. It is also submitted that the proceedings are an absurdity since on the face of the orders which David Ohana is accused of disobeying and the underlying application, David Ohana is one of the claimants who obtained the orders against Kenol Kobil Limited. Moreover, the orders were served on Ms. Olympia and not David Ohana himself.

8. It is further submitted on behalf of David Ohana that the application seeking committal for contempt of court does not comply with the mandatory legal procedure for bringing an application for contempt of court. Significantly, the application was not served on David Ohana personally but upon one Ms. Olympia and there was no evidence that David Ohana knew of the existence of the court orders when he signed the termination letters and that he took the said action in defiance of the orders.

Determination

9. The single issue for determination in this application is whether the Claimants have made out a case for committal of David Ohana for contempt of court.

10. Black's Law Dictionary (Ninth Edition) defines contempt of court as:

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

11. The orders in question which were issued by this Court on 14th August 2012 were directed at Kenol Kobil Limited, its Managers, Directors and Agents. As General Manager, David Ohana clearly fell under the category of persons to whom the orders were directed.

Absurdity

12. In the submissions filed on behalf of David Ohana, it is submitted that the Claimants' application

which is filed on behalf of employees of Kenol Kobil is absurd in as far as it seeks committal of David Ohana who is himself an employee of Kenol Kobil Limited and therefore potentially a claimant. With much respect, that is a simplistic argument that avoids the grave matter before the Court.

13. It is not in contest that David Ohana was at all material times the General Manager of Kenol Kobil Limited rendering him part of the management of the Company to whom the orders of the Court dated 14th August 2012 were directed. The fact that he also fell under the group known as employees of Kenol Kobil Limited does not take away the responsibility to obey the court orders.

14. Managers of organisations though themselves employees, also carry the responsibility of management of the organisation for which they must be held accountable. This responsibility includes compliance with court orders and managers cannot use their position as employees to avoid this crucial responsibility.

15. Moreover as held in the case of *Wildlife Lodges Ltd Vs County Council of Narok and Another [2005] 2EA 344*, a party is not at liberty to disobey a court order merely because the order appears to be invalid or irregular. If for any reason, a party is unclear about the import of a court order, there are avenues for interpretation or review before the issuing court and if a party is dissatisfied with the order altogether, there is an avenue for appeal to a higher court.

16. In underscoring the importance for obedience of court orders, the Court in the case of *Clarke and Others Vs Chadburn & Others [1985] 1All E.R (PC), 211* held that the fact that a party thinks that an order was improperly obtained is no excuse for disobeying it. The remedy is to vary or discharge it. In sum, defiance of a court order is never an option open to any party.

Service of the Orders

17. With regard to service of the orders, David Ohana argues that because the orders in question were not served on him personally, then he cannot be held liable for their disobedience.

18. The **Halsbury's Laws of England (Fourth Edition) Volume 9 at page 37** provide as follows:

“As a general rule, no order of court requiring a person to do or abstain from doing an act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.”[Emphasis added]

19. In similar fashion, the explanatory notes in Order 52 Rule 3(1) of the England Supreme Court Practice Rules which are applicable in our jurisdiction provide that:

“No order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which is said to constitute the contempt, or, if, the order is directed to a group of persons or a corporation, some appropriate member has been personally served.”[Emphasis added]

20. My understanding of these provisions is that as a general rule and in the normal scheme of things, personal service in matters of contempt is required. However, where the Court is satisfied that a person accused of disobeying a court order, though not personally served, in fact had knowledge of the order at the time of the disobedience, punishment for contempt is properly due.

21. To that extent I agree with the holding by **Lenaola J** in the case of *Basil Criticos Vs Attorney General and 8 Others [2012] eKLR* that knowledge supersedes personal service and where a party has knowledge of a court order, personal service is rendered unnecessary.

22. In the instant case, the orders were served on one Ms. Olympia of the Legal Department at Kenol Kobil Limited on 15th August 2012. In this regard, the Court takes judicial notice that service of court process on bodies corporate is ordinarily effected on personnel of the Legal Department who then bring it to the attention of management.

23. In my view, service on Ms. Olympia constituted service on an appropriate member of the management of Kenol Kobil Limited as provided in the explanatory notes in Order 52 Rule 3(1) of the England Supreme Court Practice Rules and was therefore proper service on Kenol Kobil Limited and its managers, including David Ohana.

24. At any rate, there was no averment from either David Ohana or Ms. Olympia that the order was in fact not brought to the attention of David Ohana. I therefore find that David Ohana was indeed aware of the orders of this Court issued on 14th August 2012 as early as 15th August 2012 when the said orders were served on Ms. Olympia.

David Ohana's Actions

25. In spite of the knowledge of the orders of this Court issued on 14th August 2012, David Ohana went ahead to issue termination letters to Annette Ounga, Abigai K. Bundi, Gerald Okoth Wamayah and Joseph K. Gatuma, all employees of Kenol Kobil Ltd between 28th and 31st August 2012.

26. The termination letters which were similar in content stated *inter alia*:

“Following review of all Business processes across the Group, particularly the.....Department's performance and in consultation with your immediate supervisor, we note with concern that your position's performance and contribution to the whole process calls for immediate action in order to meet Company Business expectation.

.....we hereby give you one month notice to terminate your services effective.....

However, you will be exempted from serving the notice period and will be paid one month's pay in lieu of notice.....

Yours faithfully,

David Ohana

General Manager”

27. A reading of these letters indicates that the terminations effected by David Ohana between 28th and 31st August 2012 were subsequent to an overall review of the business of Kenol Kobil Limited and had to do with the performance and contribution of the positions held by the concerned employees to the overall business. This in my view was directly related to the suit filed by the Claimants upon which the interim orders were issued. By these orders, the Court had also ordered maintenance of industrial peace pending *inter partes* hearing of the Claimants' application and the terminations effected by David Ohana could not be said to contribute to industrial peace.

28. In the case of *Mutitika Vs Baharini Farm Limited [1985] KLR 229, 234* the Court of Appeal held that:

“A person one who, knowing of an injunction, or an order of stay willfully does something, or causes others to do something, to break the injunction or interfere with the stay is liable to be committed for contempt of court as such person has by his conduct obstructed justice.”

29. I have carefully considered the actions taken by David Ohana subsequent to the orders of this Court issued on 14th August 2012 and have arrived at the conclusion that the said David Ohana knowingly and willfully violated the said orders and hereby cite him for contempt of court.

30. Consequently, I direct that David Ohana shall pay a fine of Kshs. 1,000,000 (read One Million Kenya Shillings) and in default the said David Ohana shall be committed to civil jail for a period of thirty

(30) days. This penalty takes effect immediately.

31. As no arguments were advanced in support of the prayer to nullify the decisions made by David Ohana post the orders issued on 14th August 2012, the Court makes no findings on this score.

32. The costs of this application will be met by the Contemnor.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF JUNE 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Change instructed by Rachier & Amollo Advocates for the Claimants

Mr. Oyatsi instructed by Shapley Barret & Co. Advocates for the Contemnor