



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
PETITION NO. 4 OF 2014

GEOFFREY MAKANA ASANYOPETITIONER

- VERSUS -

NAKURU WATER AND SANITATION

SERVICES COMPANY.....1ST RESPONDENT

JOHN CHERUIYOT.....2ND RESPONDENT

RIFT VALLEY WATER SERVICES BOARD....3RD RESPONDENT

JAPHETH MUTAI.....4TH RESPONDENT

THE COUNTY GOVERNMENT OF NAKURU...5TH RESPONDENT

H. E. KINUTHIA MBUGUA.....6TH RESPONDENT

ATTORNEY GENERAL.....7TH RESPONDENT

AND

NATIONAL UNION OF WATER AND

SEWERAGE EMPLOYEES.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 18th July, 2014)

RULING

On 30.05.2014, the court entered judgment for the petitioner against the respondents for:

1. A declaration that the pretentious decision and process of advertising and intended filling of the positions of 6 directors of the 1st respondent was opaque, egregious, clandestine, capricious, whimsical, and contrary to Articles 41 and 47 of the Constitution of Kenya hence unconstitutional,

and, the decision and process of advertising and consequential processes are null and void.

2. A declaration that in realigning the organisation and operations of the 1st respondent to the Constitution of Kenya, 2010 and to good corporate governance, the 1st to 6th respondents by themselves and their respective agents shall institute just transitional measures that respect the petitioner's accrued constitutional and other rights and obligations as the appointed serving director of the 1st respondent representing the local business community.
3. The respondents to pay the petitioner's costs of the petition.

After the delivery of the judgment, it was orally applied for the 4th to 6th respondents and for 1st and 2nd respondents that consequential to the orders made in the judgment, the parties maintain *status quo* as far as the 1st respondent's directorship was concerned and to enable the court to make appropriate orders in view of the oral application, the court ordered:

1. The 2nd respondent to convene a meeting of the 1st respondent's directors to be held within five days from 30.05.2014 and to file in court the deliberations of the board on the prevailing *status quo* of the 1st respondent's board membership and for the court to make further appropriate orders.
2. Mention on 6th June, 2014 at 9.00 am for further orders.

The petitioner moved the court and obtained leave to file a contempt application against Japheth Mutai, the 4th respondent in the petition, as the 1st respondent in the contempt application and Joseph Motari as the 2nd respondent in the contempt application.

The petitioner's notice of motion was brought under section 5 of the Judicature Act Cap 8 and section 3A of the Civil Procedure Act Cap 21, and Order 53 of the Supreme Court Practice Rules of England. The petitioner prayed for orders:

1. That the respondents namely Japheth Mutai and Joseph Motari respectively be summoned to show cause why they are defying the court orders.
2. That the respondents be committed to civil jail and detained for six months or lawfully punished in any manner as the honorable court deems fit for refusing or continuing to refuse to comply with the honorable court's orders given on 30th day of May, 2014.
3. That the respondents be condemned to jointly pay Kshs.10,000,000.00 and in default their property be attached and sold and the cost of the *exparte* application for leave to file the instant application.
4. That such further orders may be made as the honourable court shall deem proper.

The application was determined and terminated as against the 2nd respondent by order of the court following an order by consent between the petitioner and the 2nd respondent that the 2nd respondent had not authored and issued the letter forming the basis of the alleged contempt. The application was continued against the 1st respondent on the basis of the petitioner's supporting affidavit filed together with the application and the following grounds:

1. The respondent has continuously and deliberately refused to comply with the orders of the honourable court given on 30.05.2014 in Nakuru Industrial Court Petition No. 4 of 2014.
2. The respondent wrote a letter that made scurrilous attacks against the sacrosanct dignity and authority of the court.

3. The respondent's letter flows from the court's judgment and consequential orders and their selective interpretation.
4. The respondent was privy to the orders given by the court on 30.05.2014 in Petition No. 4 of 2014 in the Industrial Court at Nakuru.
5. The board of directors for the 1st respondent in the petition met on 4.06.2014 and put in place proper transitional arrangements and filed in court on 6.06.2014. The 1st respondent in the contempt application had purported to disregard the board by writing the letter of 12.06.2014.
6. By refusing to obey the court orders, the 1st respondent in the contempt application was in contempt of court.
7. The dignity and authority of the court needed to be protected so that confidence in the judiciary is upheld.

The letter by the 1st respondent in the contempt proceedings (writing as the Chief Executive Officer of the 3rd respondent in the petition) that is said to make scurrilous attacks against the sacrosanct dignity and authority of the court and addressed to the managing director of the 1st respondent in the petition stated as follows:

“Nakuru Water and Sanitation Services Company (NAWASSCO) “Board of Directors Meeting” held on 4th June, 2014 at the Company’s Boardroom

The above subject refers.

We are aware that the above ‘meeting’ took place as indicated above and that during the said ‘meeting’, another one was scheduled for Friday, 13th June, 2014 at the same venue. What is however not clear to us is how the above ‘meeting’ was convened and the agenda or nature of business that was purported to be transacted.

As you are aware, the memorandum and articles of association of the company were amended and filed with the registrar of companies 3rd March, 2014. Consequently, the terms of office of the former directors were abolished in line with section 22 of the Companies Act. The section provides as follows: 22(1) “Subject to the provisions of this Act the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all provisions of the memorandum and of the articles.”

We have also analyzed the judgment of the Industrial Court in petition No. 4 of 2013 and although we have since appealed against the entire decision in the Court of Appeal at Nairobi, the terms of the judgment are clear beyond any peradventure.

The court after declaring the process of advertising for directorship and consequential processes null and void, it went ahead to task all the respondents in the petition “by themselves and their agents with the institution of just transitional measures that respect the petitioner’s accrued constitutional and other rights and obligations as the appointed serving director of the 1st respondent representing the local business community.”

You should therefore move with speed to consult the county government and the licensee with a view to putting in place transitional measures as directed by the court.

In the circumstances, the above ‘meeting’ which took place and whatever decisions were made were not only null and void but the same borders on the criminal. To this end, you need to write so all those who attended that ‘meeting’ and drew any allowances to refund all the monies paid to them

failure to which we would institute mechanisms to recover the same at their own costs.

As for the scheduled meeting for 13th June, 2014, the same must not proceed at the company's premises as NAWASSCO must not be seen to be abetting and condoning an illegality.

Signed

Eng. Japheth Mutai

Chief Executive Officer”

To oppose the contempt application, the 1st respondent as cited filed his replying affidavit on 27.06.2014. The pertinent statements in the replying affidavit are as follows:

1. That the respondent was aware of the judgment that was made by the court and delivered on 30.05.2014.
2. That the respondent was informed by his advocates on record that after delivery of the judgment, the court made subsequent orders directing the managing director of NAWASSCO to convene a meeting of the board of directors before 6.06.2014 to ascertain *status quo* of the board of directors.
3. At paragraph 7 of the replying affidavit, the respondent stated thus, **“7. THAT I am advised by my advocates on record advice which I verily believe to be true that the subsequent orders by the learned Industrial Court judge were highly irregular and illegal as after the delivery of the final judgment the court became *functus officio*.”** The court has considered that paragraph of the replying affidavit and finds that such advice by the respondent's advocates that the court order was **“irregular and illegal”** and if the same is not denied by the advocates as it appears to be the case would amount to unacceptable and unprofessional conduct or behavior on the part of the advocates as officers of the court. The court holds that it would be disgraceful or dishonourable conduct incompatible with the status of an advocate for the advocate to advise a client that an order made by the court is illegal or irregular. The court holds that advocates as officers of the court are bound to uphold the dignity of the court by respecting and advising their clients to respect court orders. The court holds that a court order may be amenable to setting aside upon review or appeal on the ground of illegality or questionable legitimacy but until the order is to set aside, the order is valid and binding.
4. That the respondent was informed by his advocates on record Odhiambo & Odhiambo Advocates that the managing director of NAWASSCO sent out letters on the 3rd June 2014, inviting the directors of the board of NAWASSCO to a meeting and the respondent considers that the board members who attended the meeting were illegal board members.
5. That the order of 30.05.2014 was addressed to the managing director to call a board meeting, a board meeting which he convened and a fact which the honourable court is aware of as the minutes of the meeting were filed and presented to the honourable court on 6.06.2014.
6. That the respondent has never been served by the court order the *ex parte* applicant (the petitioner) is claiming that the respondent has failed to comply with. Further, the court did not require the respondent to perform or not to perform any actions from the orders he has allegedly refused to comply with so that the respondent has been incorrectly cited in the contempt application. Thus, the application for contempt should be dismissed with costs.

The firm of Odhiambo & Odhiambo Advocates filed a preliminary objection said to be for the two cited respondents, Japheth Mutai and Joseph Motari. The preliminary objection stated that the honourable court lacked the jurisdiction to hear the contempt applications by dint of section 5 of the Judicature Act Cap. 8 Laws of Kenya and that therefore, the contempt proceedings herein be dismissed and struck out with costs.

The court has considered the contempt application, the supporting affidavit, the replying affidavit, the preliminary objection and the materials on record including the parties' respective submissions. The court makes findings on the issues for determination as follows:

The **1st issue** for determination is whether the court is vested with the jurisdiction to hear and determine the contempt application in view of the preliminary objection. Section 5 of the Judicature Act provides as follows:

“5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”

It was submitted for the respondent that the section conferred the jurisdiction to punish for contempt upon the High Court and the Industrial Court as established is not the High Court but a court of equal status to the High Court. For the applicant, it was submitted that Article 162 of the Constitution establishes the Industrial Court as a superior court together with the Supreme Court, the Court of Appeal, the High Court and the Land and Environment Court. It was submitted for the applicant that the superior courts are vested with the jurisdiction to punish for contempt as envisaged under section 5 of the Judicature Act.

The court has considered the respective submissions made for the parties. The Judicature Act does not define **“High Court”** but defines Chief Justice and Judge in terms of appointments under the former Constitution of Kenya and which provisions ceased to apply with the coming into operation of the Constitution of Kenya, 2010. Thus, interpretation as urged for the respondent would mean that the High Court and the Court of Appeal as constituted and in place under the Constitution of Kenya 2010 are not the courts as envisaged in section 5 of the Act with the consequence that the section is vestigial and inconsequential. Such interpretation would result into absurd and undesirable outcomes in our administration of justice.

In the opinion of the court, section 5 of the Judicature Act is to be interpreted to enable our superior courts as established under the Constitution of Kenya, 2010 and the relevant enabling legislation to punish for contempt. In particular, section 7(1) of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution of Kenya, 2010 provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. Taking into account that provision, the court finds that the court is vested with jurisdiction under section 5 of the Judicature Act to hear and determine contempt proceedings including the kind of application for contempt that was filed in this case. Accordingly, the court finds that the preliminary objection shall fail.

In making that finding, the court has taken the view that the High Court (Practice and Procedure) Rules made under the Judicature Act have been construed to apply to the superior courts of record including the High Court, the Industrial Court and the Land and Environment Court and section 5 of the Act will be construed accordingly.

The **2nd issue** for determination is whether the cited respondent was aware of the orders that the applicant says that the respondent failed to obey and wrote about as per the letter that is said to be offensive of the dignity of the honourable court. The respondent has stated that he was informed by his advocates on record about the orders made after judgment that required the managing director to convene the board of directors' meeting. It is not clear from the affidavits when and how the advocates informed the respondent about the orders and the respondent stated that he was not served with those orders. The applicant has not placed before the court the relevant affidavit to show that the orders were served upon the respondent. In such circumstances, the court finds that the respondent cannot be said to have been

aware of the court orders as he wrote the letter with reference to the meeting as had been ordered by the court. It was submitted for the respondent that the applicant had to show that he had served the orders with a penal notice upon the respondent as envisaged in Order 45 rule 7(2) of the England Supreme Court Practice Rules. The respondent relied on the holding that service of the order and the penal notice were mandatory in contempt proceedings as held in **Victoria Pumps Limited and Another –Versus- KPA & 4 Others[2002] 1 KLR**; **Abdiwahab Abdullahi Ali –Versus- Governor County Government of Garissa & Another [2013] eKLR** ; and **Johnstone Khejeli –Versus- The Speaker, County Assembly of Vihiga & Another [2014]eKLR**. The court upholds the holding and finds that in the present application, the applicant has failed to show that the at the time of writing of the offensive letter the respondent was aware of and was served with the court order directing the managing director to convene the meeting of the board of directors and to ascertain the board’s directorship. Accordingly, the application for contempt will fail.

The 3rd issue for determination is whether the applicant should not have been heard by the court because he was allegedly in contempt of the court. It was submitted for the respondent that in **Hadkinson – Versus- Hadkinson [1952] 2 ALL ER 567, 569-570**, the opinion was that if a party engaged in continuing disobedience of a court order so as to impede the course of justice in the cause by making it difficult for the court to ascertain the truth or enforce the orders which the court may make, then the court may in its discretion refuse to hear the party until the impediment is removed or good reason is shown why it should not be removed. It was submitted that the actions of the ex parte applicant and the other members of what was said for the respondent to be a defunct board of the 1st respondent in the petition made it difficult for order 2 in the judgment to be realized so that the petitioner ought not to have been heard until he purged his alleged actions of disobedience. The court has considered the submission and finds that the alleged actions on the part of the petitioner would constitute a fresh cause of action, the alleged disobedience or impediment was not established and therefore, the allegations would not operate as a bar to the petitioner as the ex parte applicant in the contempt proceedings from being heard by the court during the contempt proceedings.

In conclusion, the application for contempt filed on 20.06.2014 and the preliminary objection filed on 07.07.2014 are dismissed with orders that the cited respondent and the ex parte applicant shall each bear own costs of the application and the preliminary objection.

Signed, dated and delivered in court at Nakuru this Friday 18th July, 2014.

BYRAM ONGAYA

JUDGE