



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1652 OF 2013

MIRIAM WAMBUI THIRIKU CLAIMANT/APPLICANT

VERSUS

QURESH AHMED HUSSEIN 1ST CONTEMNOR RESPONDENT

BOMAS OF KENYA 2ND CONTEMNOR RESPONDENT

M/S Wambui for Claimant/Applicant

Mr. Dokas Ouma for Respondents

RULING

1. Application dated 16th May 2014, seeks committal to Civil Jail of the Respondent for failing to honour Court order issued by Hon. Marete J. on 15th October 2013 and further extended on 1st November 2013.

The Application was preceded by an application seeking leave dated 25th November 2013 and amended on 17th March 2014.

2. The interim order of the Court dated 15th October 2013 restrained the Respondents from:

- i. Proceeding with the intended disciplinary action and process or terminating the employment of the Applicant; and
- ii. Restraining the Respondent from hiring a replacement of the Applicant; pending the hearing and determination of the Application interpartes.

3. **Applicant's case**

That the order of the Court was extracted and served upon the Contemnors on 16th October 2013 but they have ignored, disrespected and declined to obey the said order in that;

4. They have locked the Claimant out of their premises from 29th October 2013 to the 5th March 2014 hence denying her access to her office.

5. They issued the Claimant/Applicant with a termination letter dated 15th October 2013 on 29th

October 2013 and further withheld paying her salary despite the Court order stopping the said action.

6. On 5th March 2014, they allowed the Claimant access to her office though made less comfortable but have failed to allocate her any duties.

7. The General Manager of the Respondent failed to appear before the Court on 1st November 2013, in spite of an express order of the Court requiring him to do so.

8. The Application is supported by the Affidavit of the Claimant / Applicant dated 15th April 2014 attesting to the aforesaid facts including annexures elaborating the defiant actions by the Respondent.

9. Furthermore, an Affidavit of Service by one, John Omudaya, a licenced Court process Server states that on 4th November 2013, he received copies of a Court order dated and issued on 1st November 2013 with instructions to serve it upon the General Manager of the Respondent.

10. That on the same day he arrived at the Bomas of Kenya premises along Langata Forest Edge Road in Langata, and proceeded to the General Manager's office who he served with the said order. That the General Manager referred him to the Registrar for service and stamping.

11. That he also served the Human Resource Manager who also referred him to the Registry for service and stamping copies of the said order duly stamped as received on 4th November 2013 at 11.30 a.m. are attached to the Affidavit of service.

12. The Applicant urges the Court to find the Respondent to be in contempt of Court and take appropriate action as prayed.

13. The Applicant relies on the case of **Kenya Tea Growers Association –vs- Francis Atwoli and 5 others** [2012] eKLR where Lenaola J. cited with approval the case of **Clarke and others –vs- Chadburn & others [1958] (ALL E.R (PC), 211** as follows;

“I need not cite authority for the proposition that it is of high importance that orders of the Courts should be obeyed, wilful disobedience to any order of the Court is punishable as contempt of Court, and I feel no doubt that such disobedience may properly be described as being illegal, even if the Defendants thought that the injunction was improperly obtained or too wide in terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it”.

14. Furthermore, the Applicant cites the case of **Econet Wireless Ltd. –vs- Minister for Information and Communication of Kenya & another [2005] eKLR** where the Court held;

“where an application for committal for contempt of Court is made the Court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both”.

15. **Response**

The Respondent opposes the Application and filed a replying Affidavit of Mr. Quresh Ahmed Hussein, the General Manager of the 2nd Respondent.

16. The nub of the objection is as follows;

That by the time the Claimant / Applicant rushed to Court she had been charged with a disciplinary offence and invited to appear on 14th October 2013 before a disciplinary committee by a letter dated 7th October 2013 which she did.

17. That the Applicant did not disclose these facts to the Court and thus misled the Court to issue interim orders.

18. That on 15th October 2013, the Claimant's services had already been terminated and the Claimant ought to have challenged the dismissal but not seek injunctive orders when the horse had already bolted.

19. The letters of invitation to the disciplinary hearing and the one of termination of employment are attached.

20. That the Claimant never reported to work as alleged in the Application for contempt of Court order until sometime in the month of March when the Respondents received a letter from the Claimant's Advocates directing the Claimant to present herself at the work on 5th March 2014 at 7.45 a.m. The letter is attached and marked 'QAH7'.

21. That the Claimant is already back at work and is receiving her wages. Attached and marked 'QAH8' is a true copy of the payment of wages.

22. That the Claimant admits in her replying Affidavit that she has access to her work place.

23. The Respondents pray that this application for contempt be dismissed and the main suit to proceed on the merits.

24. The Respondents deny that they are in contempt of the Court order. That the Advocates for the Respondent have been appearing in Court all along and therefore the issue of failing to attend Court by the Respondent does not arise. The 1st Respondent was out of the Country in the initial stages of this matter and could not therefore make personal appearance, a matter that was explained to the Court.

25. **Issue for determination**

1. Did the 1st and 2nd respondents wilfully fail to honour the order dated 15th October 2013?
2. If the answer to above is in the affirmative what penalties are available to the Claimant / Applicant.

26. **Determination**

The Claimant / Applicant was to appear before a disciplinary hearing on 14th October 2013, the same date she obtained the order of the Court which was extracted on 15th October 2013.

27. The Claimant's employment was terminated by a letter dated 15th October 2013.

28. The Court order was served on the 1st and 2nd /Respondents on 1st November 2013 long after the Claimant's employment was terminated.

29. The Claimant / Applicant was guilty of material non-disclosure to the Court at the time she obtained the Court Order.

30. The Respondents did not apply for setting aside or review of the order immediately but state that they were ready and willing to obey the Court order and did so when the Claimant / Applicant presented herself at the work place in March 2014.

31. The Respondents have hence presented 'QAH8' as evidence of salary payment to the Claimant / Applicant pursuant to the Court order of 15th October 2013. However this payment was done on 17th March 2014.

32. It is the Court's considered view that the Claimant / Applicant has failed to prove that the 1st and 2nd Respondent wilfully disregarded the Court order dated 15th October 2013.

33. The offence of contempt is a criminal one and attracts penal sanctions. The onus of proof lies on the Applicant and the threshold is like in any other criminal proceedings beyond reasonable doubt.

34. The Applicant has failed to discharge its burden of proof to the standards required.

35. The Court is satisfied that as soon as the Claimant / Applicant presented herself to the work place, she was reinstated to her workplace and has been paid the requisite salary.

36. The Court notes that it is desirable that contested issues of fact be resolved upon hearing both parties. Rushing to grant interim orders which have final effect is inimical to administration of justice and is to be discouraged.

For these reasons, the Application is dismissed with costs in the cause.

Dated and Signed at Nairobi this 11th day of December, 2014.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE

Signed, Dated and Delivered at Nairobi this 17th day of December, 2014.

NZIOKI WA MAKAU

JUDGE

Delivered in the presence of:

ADVOCATE FOR THE PETITIONER

ADVOCATE FOR THE 1ST RESPONDENT

ADVOCATE FOR THE 2ND RESPONDENT