Mudegu v Kenyatta University (Constitutional Reference 44 of 2019) [2022] KEHC 11520 (KLR) (Constitutional and Human Rights) (2 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11520 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL REFERENCE 44 OF 2019

HI ONG'UDI, J

AUGUST 2, 2022

BETWEEN

LEGEUS LOMOSI MUDEGU .... PETITIONER

AND

KENYATTA UNIVERSITY .... RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated February 2, 2021 which was filed under section 3A of the *Civil Procedure Act* cap 21, order 40 rule 3 of the *Civil Procedure Rules*, and all other enabling provisions of the law.
2. The application seeks the following orders:
    i. This application be certified urgent and this honourable court do issue and order of stay against the decision by the respondent herein summoning the petitioner to appear before the disciplinary committee for hearing on the February 10, 2021.
    ii. That the respondent's Registrar Academics be compelled to re-admit the applicant to School of Humanities and Social Sciences fourth year of study 2nd semester as the respondent forfeited on its right to conduct and conclude disciplinary proceedings if it so desired against the applicant herein within 90 days from February 27, 2020 when the judgment was entered.
    iii. That leave be granted *ex-parte* at first instance for the applicants to pursue contempt of court proceedings to have the Registrar Academics one Mr Mutegi Mukobwa of the respondent, committed to prison and denied audience before this honourable court until they purge their contempt and have the applicant herein admitted to the School of Humanities and Social Sciences fourth year of study 2nd semester.

iv. That the respondent herein be denied audience in this matter and the entire proceedings herein until and unless it purges the contempt of court committed herein by admitting the applicant to the School of Humanities and Social Sciences fourth year of study 2nd semester.

v. An order of committal to be made against the directors, agents and employees of the respondent, to prison for such period as this honourable court may deem fit and just in that the following directors, agents and employees named hereunder:

Mr Mutegi Mukobwa, has:

Disobeyed the High Court Constitutional and Human Rights Division judgment given on the February 27, 2020 where the court made orders that:

a. That the respondent had violated on the applicant right to a fair administrative action and if it so desired shall commence and conclude disciplinary proceedings against the applicant herein within 90 days from the date of judgment February 27, 2020.

b. The respondent having waived its said right the applicant applied to be admitted back to school but the respondent has refused to admit him to the said school and are purporting to hold illegal and unlawful disciplinary proceedings against the applicant on February 10, 2021 close to 1 year from the date of the judgment.

vi. An order that the costs of these contempt proceedings be borne by the above named respondent.

3. The application is supported by the following summarized grounds that:

i. This court entered judgment in favour of the petitioner on February 27, 2020 and made a declaration that the respondent violated the petitioner's right to fair administrative action.

ii. Further that the court made orders that the respondent shall, if it so desires, conduct and conclude disciplinary proceedings against the petitioner within 90 days from the date of the judgment.

iii. The respondent herein being aware of the said judgment forfeited its right to conduct and conclude the said disciplinary proceedings against the petitioner within the timeline given by the court and as such the petitioner ought to be admitted back to school so as he can complete his studies.

iv. The petitioner wrote to the respondent vide a letter dated January 11, 2021 requesting that he be admitted back to school so that he could conclude his studies.

v. The respondent has refused and declined to admit the petitioner to school whilst summoning the petitioner to appear before the disciplinary hearing that was scheduled for February 10, 2021. One year after the judgment had been rendered thus outside the timelines given by the court.

vi. The respondent's decision to refuse to admit the petitioner to school and purport to institute disciplinary proceedings against him in clear disregard of the Judgment issued by this court and the orders. As such, being that the decision to institute the said disciplinary proceedings was discretionary and the respondent chose to forfeit on its right, it cannot purport to conduct the said proceedings outside the set timelines. This is against the spirit of fair administrative action that should be expeditious, efficient, lawful, reasonable and procedurally fair.

vii. The respondent resumed normal operations as from October 2020 when it issued a circular on phased re-opening dates for Second semester/trimester 2019/2020 academic year and time continued to run during the said time after the closure of the Institution on March 17, 2020 as a result of the Corona pandemic.

viii. The respondent has disobeyed the said orders and the entire proceedings are being rendered nugatory and an academic exercise as the authority and dignity of this honourable court is being ridiculed.

ix. The petitioner has no other way of enforcing the said orders unless the respondent purge's its contempt.

4. The application is supported by the averments in the petitioner's affidavit also dated February 2, 2021 which reiterates the contents of the grounds outlined herein above.

5. In addition he deposes that following his letter to the respondent for admission, the respondent summoned him through a text message to appear before the disciplinary committee on February 10, 2021. The said text message did not disclose the witnesses that would testify against him, which to him was unprocedural and irregular. In view of his case, he avers that the respondent's actions were in bad faith and in contempt of court.

The Respondents' Case

6. The respondent in response filed its replying affidavit dated June 25, 2021 sworn by the respondent's Academic Registrar, Dr Benard Kivunge.

7. He deposes that the application is an abuse of the court process. The reason being that the terms of the alleged order that the Registrar is alleged to be in contempt of have to be clear, unambiguous and binding on the respondent. Moreover that the respondent had knowledge of proper notice of the terms of the order and further that it did not act in breach of the terms of the order deliberately.

8. He deposes further that the respondent closed on March 17, 2020 owing to Covid-19 and resumed its operations albeit in a scaled down capacity in October 2020. It followed that it could not conduct the disciplinary proceedings within the 90 days from February 27, 2020. It however invited the petitioner to a disciplinary hearing *vide* a letter dated January 19, 2021. The letter informed him that his disciplinary proceedings hearing was scheduled for February 10, 2021. He opted to file the present application instead of attending the disciplinary proceedings hearing.

9. He deposes that the respondent could not schedule the disciplinary proceedings earlier as the then Registrar (Academic), Prof Andaje Mwisukha died on January 15, 2021 after a short illness. It is deposed therefore that the respondent was not deliberate in its conduct of not convening the disciplinary hearing within 90 days from February 27, 2020.

10. Further the respondent proceeded to invite the petitioner again to attend a disciplinary hearing scheduled for March 18, 2021 which the petitioner attended. The respondent's disciplinary committee issued its decision on the outcome to the petitioner *vide* a letter dated May 24, 2021.

The Petitioner's Submissions

11. The firm of Omboko & Company Advocates on behalf of the petitioner filed written submissions and a list of authorities dated April 19, 2022. Counsel submits the issues for determination to be:

i. Whether the respondent is guilty of willful disobedience.

ii. The binding nature of High Court judgments and orders and the consequence of ignoring them.

iii. Whether the respondent acted in clear negligence or carelessness in implementing the court order which amounts to contempt.

iv. Whether the petitioner's application is merited and whether the same should be allowed as prayed.

12. Counsel on the first issue submits that the respondent is guilty of wilful disobedience of court orders. This is since it was at all the times aware of the said orders contained in the judgment dated February 27, 2020. While the issue of Covid 19 is apparent, counsel submits that by times the petitioner made a request to be re-admitted to school, the respondent had been in operation for a period of over 90 days cumulatively. This is because the institution had closed on March 16, 2020 and re-opened on October 16, 2020. This in essence made the disciplinary proceedings hearing to be outside the 90 days as it was conducted on May 24, 2021. This was 8 months outside the time stipulated by the court order.

13. To support this point counsel relied on the case of *Council of Governors v Seth Panyako & 4 others; Ministry of Labour and Social Protection & 2 others (Interested Parties*) [2019] eKLR, Cause No 69 of 2019 where it was held that the issue is plain and simple. That is to say was there an order lawfully issued by the court? If so, was it reasonably brought to the attention of the person to whom it was directed? And finally has the person complied with the order? If not, has the person sought at the next available opportunity to have the order reviewed or set aside or has he appealed to a superior court against the order? From the foregoing counsel submits that the respondent chose not to obey the court order under the pretext that the judgment was not clear as to what was to happen had it not conducted the disciplinary process.

14. On the second issue, counsel submits that court orders are not mere pronouncements but rather once made, the same is binding between the parties to it unless the same has been overruled or overturned by a court of superior authority. To buttress this point reliance was placed on the case of *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another* CCT 19/11(75/2015) where it was held that the rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. Additional reliance was placed on *Canadian Metal Co Ltd v Canadian Broadcasting Corp (No 2)* [1975] 48 DLR (30), *Carey v Laiken* [2015] SCC17, *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR and *Martin Nyaga Wambora and another v Justus Kariuki Mate & another* [2014] eKLR.

15. Counsel proceeds to argue that the petitioner had a legitimate expectation that after the lapse of 90 days, the respondent would not subject him to any disciplinary process but rather would admit him back to school. As a consequence the petitioner was highly prejudiced with the respondent's decision. Likewise he argues that the decision that ultimately had the petitioner expelled from the institution was made in total disregard of the law and as such it is null.

16. On the third issue counsel submits that from the facts of this case and evidence adduced, the respondent chose to forfeit its right to commence and conclude the disciplinary process within 90 days. It is asserted that it only commenced and concluded the process when it thought it fit. According to him the exercise was not a must and once the 90 days had lapsed the respondent had no option other than to re-admit the petitioner to school so that he could conclude his studies.

17. In the circumstances of this case, counsel submits that the order was observed in a negligent manner that had no regard to the judgment of the court and hence the respondent's foregoing decision was a nullity *ab initio*. To support this point reliance was placed on the text of *EBC's Supreme Court*

on Contempt of Court [HB] by Surendra Malik & Sudeep Malik, Publisher: Eastern Book Company [EBC] pages 226-227.

18. On the final issue, counsel submits that no explanation was ever offered to the petitioner as to why the respondent did not comply with the court orders leaving the petitioner to suffer the consequence. Similarly it is argued that since the respondent did not adhere to the court orders the decision made should not be allowed to stand and the respondent ought to be compelled to re-admit the petitioner to the institution so that he can complete his studies.

19. In support reliance was placed on the case of *Hon Basil (Criticos v AG & 8 others* [2012] eKLR where it was noted that it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.

20. To that end, counsel submits that the petitioner has succeeded in proving that the respondent actions were deliberate, as it was aware of the court orders and it only sought to take reactionary steps when the petitioner sought to be re-admitted to the institution and as such it clearly acted in contempt of court.

The Respondent's Submissions

21. The respondent through its counsel Mohammed Muigai LLP advocates filed written submissions and a list of authorities dated April 27, 2021.

22. Counsel commences by submitting that it is not in contention that court orders are not made in vain and are meant to be complied with. In fact counsel submits that the court in the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] 1 KLR 828 held that it is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts be upheld at all times.

23. It is submitted that contempt of court proceedings are quasi-criminal in nature and since the liberty of a person is at stake, it must be proved beyond peradventure that one has actually disobeyed a court order before he/she is found guilty of contempt. In support he relied on the case of *North Tetu Farmers Co Ltd v Joseph Nderitu Wanjohi* [2016] eKLR which outlined the principles to be considered in a contempt of court application and observed that the courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined.

24. As such, the standard of proof must be higher than proof on a balance of probabilities, but not exactly beyond reasonable doubt. Additional reliance was placed on the cases of *Wildlife Lodges Ltd v County Council of Narok and another* [2005] 2 EA 344, *Issenberg & another v Anthony Machatha Kinyanjui* [2021] eKLR, *India Airports Employees Union v Ranjan Catterjee & another* [AIR 1999 SC 880 1999 (2) SCC:537 and *Carey v Laiken*, 2015 SCC 17.

25. Counsel submits that the petitioner has not satisfied any of the elements outlined in the above cited cases. Furthermore, that the petitioner has not demonstrated any willful disobedience on its part. Likewise counsel argues that the impugned order is not clear on what happens if the respondent does not conduct the disciplinary proceedings within the given timelines making it overly broad and unclear. In the same way he contends that it is clear that the set timelines were affected by the extenuating circumstances occasioned by Covid 19.

26. Finally, counsel submits that the prayer to re-admit the petitioner amounts to a review of the orders issued on February 27, 2020 which is ill-advised and an abuse of the court process. He urges the court to dismiss the application.

Analysis and Determination

27. Having perused the pleadings, parties submissions, authorities cited and the law I find that the only issue for determination is whether the respondent is in contempt of the orders of this court granted on February 27, 2020.

28. The petitioner's case is that the respondent violated this court's order which directed the respondent to conduct and conclude if it so desires disciplinary proceedings against the petitioner within 90 days from the date of judgment. The petitioner claims that despite the knowledge of the court order the respondent failed to comply with it. Moreover that it only sought to do so when the petitioner sought to be re-admitted into the institution to complete his University course in the School of Humanities and Social Sciences. As a result the petitioner seeks to have the Registrar, Academics committed to prison until the respondent purges the contempt.

29. The respondent on the other hand denied violating the court order as alleged. It stated that despite their knowledge of the court order compliance was rendered difficult by the circumstances brought about by the Covid 19 pandemic and passing on of the then Registrar (Academic) Prof Andaje Mwisukha. In addition to this the respondent argued that the said order, was ambiguous and not clear on the implication of non-compliance. Additionally it was stated that the terms of the alleged contempt by the Registrar Academic were not clear. Nevertheless the disciplinary proceedings were in the end conducted and a verdict issued.

30. Contempt of Court is defined in the *Black's Law Dictionary* as the

    'Wilful disregard of the authority of a court of justice or legislative body or disobedience to its lawful orders.'

31. The law upon which contempt of court proceedings are premised in this court is the *Judicature Act* chapter 8. Section 5 of the *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.

32. The courts have pronounced themselves on the importance of obedience of court orders. It is definite that this court's opinion is unanimous on the issue. This position was well elucidated in the case of *Econet Wireless* case (*supra*). Similarly the court in the case of *Teachers Service Commission v Kenya National Union of Teachers & 2 others* [2013] eKLR opined as follows:

    > " 38. The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither

is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.

39. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."

33. The importance of compliance with court orders cannot be overemphasized. The question that follows accordingly is whether the petitioner has made out a case against the respondent and proven the elements of non –compliance with this court's orders on its part.

34. The court in the case of *Lentei Ole Kiserian v District Land Registrar, Kajiado & 5 others* [2018] eKLR opined as follows:

" In the case of *North Tetu Farmers Co Ltd v Joseph Nderitu Wanjohi* [2016] eKLR where Justice Mativo stated that;

"writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-

'there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.'

I note there are three elements that must be proved in contempt proceedings:

a) Applicant must demonstrate terms of orders;

b) Applicant must demonstrate knowledge of terms by respondent;

c) Applicant must demonstrate failure of respondent to comply with court order."

35. Furthermore, the court in the case of *Sheila Cassatt Issenberg & another* (*supra*) held that:

" 51. Contempt of court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if he were to succeed. This was aptly stated in Gatharia K Mutikika v Baharini Farm Limited [1985] KLR 227, that:

A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable

doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

36. Applying the cited principles to the present case, the materials placed before this court show undeniably that the respondent was first of all aware of the court orders and secondly the set timeline was not adhered to. This court notes that it is common knowledge that the Covid 19 pandemic disrupted the operations of many institutions, the Judiciary included. Besides the interruptions by the Covid-19 the respondent averred that its Registrar (Academic) Prof Andaje Mwisukha died on January 15, 2021. The deceased played a key role in academic related matters. The issue facing the petitioner/applicant fell in that docket. While it is clear that the respondent breached the court order in terms of compliance I do not find the breach to have been deliberate given the stated circumstances.

37. The petitioner argues that the terms of the order were clear and unambiguous. Yes, this is so as regards the timelines, but the order does not state the consequences of non-compliance. It's however clear that the court order did not in anyway direct the respondent to readmit the petitioner in the event of failure to conduct the disciplinary proceedings.

38. Was this order binding? The wording of the order gave the respondent an opening on whether or not to proceed with the disciplinary proceedings. It was discretionary. However after the challenges were managed the respondent chose to continue with the said proceedings. It first invited the petitioner to attend the proceedings on February 10, 2021 but he never showed up and he gave no explanation. The said proceedings were later conducted on March 18, 2021 with the petitioner/applicant in attendance. A decision was then made, after the petitioner was heard.

39. Given the situation prevailing just after the delivery of the judgment on February 27, 2020, there was no way the respondent would have conducted the disciplinary proceedings within 90 days. These were not the kind of proceedings to be held virtually. When the respondent reopened in October 2020 it was not the full opening of the institution. The death of Prof Andaje Mwisukha the Registrar (Academics) cannot just be wished away. I therefore find that the petitioner has failed to demonstrate that the failure by the respondent to hold the disciplinary proceedings within 90 days in the circumstances amounts to contempt of a court order. It has been shown that the prevailing circumstances could not allow the respondent to conduct the disciplinary proceedings within 90 days of the Judgment. The proceedings were later conducted and a verdict given.

40. Secondly there was no direction that failure to hold such proceedings would lead to automatic re-admission of the petitioner.

41. The upshot is that the application dated February 2, 2021 lacks merit and is dismissed. Owing to the nature of the application and the circumstances leading to its dismissal I make an order that each party meets its own costs.

Orders accordingly,

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 2ND DAY OF AUGUST 2022 IN OPEN COURT AT MILIMANI NAIROBI.

HI Ong'udi

Judge of the High Court