



**Banking Insurance & Finance Union (K) v Kenya Revenue Authority (Miscellaneous Civil Application E1683 of 2004)  
[2023] KEHC 17567 (KLR) (Judicial Review) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17567 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
MISCELLANEOUS CIVIL APPLICATION E1683 OF 2004**

**JM CHIGITI, J**

**MAY 18, 2023**

**BETWEEN**

**BANKING INSURANCE & FINANCE UNION (K) ..... APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. The Application before this Court is the Applicant's application dated 28<sup>th</sup> October, 2019 brought under Order LIII 3(1) and 3(4) of the Civil Procedure Rules.
2. The application seeks a raft of orders as follows;
  - i. That this Application be certified as urgent to be heard ex-parte in the first instance and leave be granted to the Applicant to cite the Respondents for contempt of Court.
  - ii. That the Director General- Kenya Revenue Authority be found to be in contempt of the Orders of Mandamus issued herein by the Honourable Court on the 9<sup>th</sup> of November, 2018.
  - iii. That pursuant to the foregoing prayer, the Director General, Kenya Revenue Authority having been found to be in contempt of the Court Orders of 9<sup>th</sup> of November, 2018 aforesaid to be committed to Civil Jail for a period of not exceeding 6 months pending the compliance with the Court Orders herein.
  - iv. That this Honourable Court be pleased to deny the Respondents the audience in this matter until and unless they purge the contempt of court committed herein.



- v. That the Respondent be ordered to pay for the cost of this Application immediately and upon determination of the Application herein.
3. The Application is supported by a supporting affidavit sworn by Judith A. Guserwa on 9<sup>th</sup> June 2019.
4. The grounds upon which the application is based are that on 9<sup>th</sup> November, 2018 the Court of Appeal in its Judgment granted an Order of Mandamus to the Applicant herein directing the Respondent to implement a check off system and deduct the union dues of its members who were employees of the Respondent (KRA).
5. The Respondent is accused of having failed to comply with the said orders despite having attended court and having been served directly with the said Order on 15<sup>th</sup> August, 2019. The Applicant also contends that it has written to the Respondent to no avail.
6. In its response the Respondent has filed a Replying Affidavit sworn on 3<sup>rd</sup> October, 2022 by Wilson Gaconi who swears to be the Chief Manager in the Human Resource Department at the Respondent.
7. In the affidavit it contends that subsequent to the decision of the Court of Appeal it filed an application in the Court of Appeal dated 4<sup>th</sup> December, 2018 seeking for the following orders;
  - a. Certification that the matter raises substantial points of law, which are of general public importance thus suitable for determination by the Supreme Court of Kenya.
  - b. Stay of execution of the Judgement of the Court of Appeal pending hearing and determination of the application and the intended Appeal to the Supreme Court of Kenya.
8. The Respondent's case is that the application is yet to be heard despite several letters to the Deputy Registrars. It is also its case that pursuant to Section 49 of the Trade Disputes Act (now repealed) the burden lies on the Respondent to satisfy the Court that it was either not bound to comply with the Union's Notice or that failure to comply with the notice was beyond the Respondent's control.
9. The Respondent's position is that it is unable to comply with the said orders for several reasons which include that it has not been supplied with an updated list of employees who the applicant alleges to be its members.
10. The Applicant is also accused of failing to provide the specified amount of Union dues/agency fees deductible from the list of members who should be a simple majority of 50 plus 1 of the Respondent's total employees.
11. Further that the Applicant has not provided the specified trade union account into which the dues shall be paid if indeed it has registered members from some of the Respondent's employees. The Respondent is said not to have any registered recognition Agreement with the Applicant in line with the provisions of Section 54(1) of the *Labour Relations Act* that provides for the simple majority of the unionisable employees.
12. The Respondent also argues that there is no existing agreement with the Respondent on who are or would be the managers so as to represent the employer in any Collective Bargaining Agreement (CBA) negotiations since Article 41 of *the Constitution* makes every employee unionisable.
13. The Respondent also argues that the Right to fair labour practices as provided under Article 41 is not an absolute right and that it may be limited by law. Further that in the instant case the Respondent urges that the employees right is limited as the services they provide that is conducting para military border security activities are considered essential services the potential disruption of which is a threat to national security.



14. The Respondent's case is that it is for these reasons that it is unable to comply with the orders of the court.
15. The Respondent filed a Further Affidavit also sworn by Wilson Gaconi on 14<sup>th</sup> February, 2023. In the affidavit he states that during the pendency of the proceedings before judgement was delivered on 22<sup>nd</sup> September, 2008 before the High Court, several Members withdrew from the membership of the union and therefore the Respondent could not remit their union fees.
16. Some of the alleged members of the Applicant claim to be members of The Kenya Union of Commercial Food and Allied Workers while some have denied being members of the union.
17. The Application was canvassed by way of written submissions. The Applicant in its submissions submits that it is not in contention that the Honourable Court of Appeal in Civil Appeal No. 255 of 2010 issued Orders that were clear and unambiguous in its Judgment dated 9<sup>th</sup> November, 2018. The orders it is submitted have not been set aside or varied and therefore remain binding on the Respondent. The issue of service according to the Applicant has also not been denied.
18. The Respondent in its written submissions contends that the Court of Appeal order was ambiguous in certain respects making it difficult for it to comply and therefore the Respondent's failure to comply with the sum cannot be said to have been wilful and therefore cannot be considered as contempt.
19. The cases of *Jaskhs Enterprises v. 1444707 Ontario Ltd* [2004] O.J. No. 4062 [2004] O.T.C 859, *Sectorguard Plc v Dienne Plc* [2009] EWHC 2693 and *Alken Connections Limited v. Safaricom Limited & 2 Others* [2013] eKLR are cited to support this argument.
20. It is the Respondent's case that proceeding with the instant application yet there is an application that seeks to stay execution of the Judgment of the Court of Appeal would render the latter pointless. The case of *Abdiaziz Sheikh Maad & 3 Others v. Govenor, Mandera County & 2 Others* [2021] eKLR is cited to support this argument.
21. The Indian Supreme Court case of *State of J and K vs. Mohd. Yaqoob Khan and Others* JT 1992 (5) SC 278 is also cited where the court observed that where the application for stay and contempt were before the same court, it is prudent to dispose of the application for stay first before delving into the application for contempt.
22. I have considered the application before this court and the affidavit in support, the response by the Respondent and the written submissions by both parties. The only issue for determination is;
  - i. Whether the court has jurisdiction to determine the Notice of Motion Application dated 28/10/2019 and grant the orders sought?
23. The Court in the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR had this to say on contempt proceedings;
  - “20. I am aware of a recent High Court ruling rendered in *Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited* in which the court held as follows:-
 

“Section 39 (2) (g) of the Act enjoins the Chief Justice to make Rules to provide for, among other things, the procedure relating to contempt of court. However, the rules to regulate the commencing and prosecuting of contempt of court applications under the Act are yet to be made. The law that previously applied in this regard



was the [Contempt of Court Act](#) of 2016, until the decision of the High Court (J. Chacha Mwita) made on 9<sup>th</sup> November 2018 in Kenya Human Rights Commission v Attorney General & Another, [2018] eKLR. The said decision declared the [Contempt of Court Act](#) of 2016 invalid for lack of public participation as required by Articles 10 and 118(b) of [the Constitution](#), and for encroaching on the independence of the Judiciary.

I am in the circumstances obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court's orders. It was in this respect observed in Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya, HCMCA No. 13 of 2008, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law. In addition, where there is a lacuna with respect to enforcement of remedies provided under [the Constitution](#) or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the [Civil Procedure Act](#) to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

The applicable law as regards contempt of court existing before the enactment of the [Contempt of Court Act](#) was restated by the Court of Appeal in Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the [Judicature Act](#) which provided that:

“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.”

This section was repealed by section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the [Judicature Act](#), which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the [Judicature Act](#). This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998



as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.”

21. I agree with the above reasoning that since the act that repealed section 5 of the *Judicature Act*<sup>[17]</sup> has been declared unconstitutional, the effect is that section 5 of the *Judicature Act*<sup>[18]</sup> still stands. Having concluded as aforesaid, I find it fit to examine the procedure for instituting contempt of court proceedings under section 5 of the *Judicature Act*<sup>[19]</sup> which provides as follows:-

(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.

24. The Applicant herein seeks to have the Director General-Kenya Revenue Authority found in contempt of the Orders of Mandamus issued by the Court of Appeal on 9<sup>th</sup> November,2018.

25. The Court sitting in Nairobi in the case of H A O v P L S [2017] eKLR held as follows on the hearing and determination of contempt applications;

“7. Filing the matter within the cause whose orders are the subject of the application would be most suitable for the applicant will not need to prove that the order in question had indeed been made. In any event, that would be the primary court or court of first instance in the circumstances.”

26. Similarly, the Court in the case of In re ZJA & TA (Minors) [2020] eKLR held as follows;

“30. In view of the above provision, I am in agreement with the respondent that the court with original jurisdiction is the court which issued the impugned orders and not this court. See HAO v PLS (2017) eKLR. It is trite that jurisdiction is key and the cornerstone of litigation and without it a court cannot move a step further hence it should down its tools. See Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd (1989) eKLR.

27. This was also the position in the case of Daqare Transporters Limited v Zainab Hashi [2021] eKLR where the court cited with approval the case of In re ZJA & TA (Minors) [2020] eKLR.

28. In our instant case the Applicant seeks to have this Court cite the Director General of the Respondent for contempt of the Orders of Mandamus issued by the Court of Appeal.

29. As has been stated in Samuel M. N. Mweru supra the High Court and Court of Appeal both have jurisdiction to punish for contempt of court and the Court of Appeal being the Court that issued the Order that is the subject of this application is best placed to handle the application on contempt.

Order:

The application dated 28<sup>th</sup> October,2019 lacks merit and the same is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MAY, 2023.**



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**JOHN CHIGITI (SC)**

**JUDGE**

