



**Munyithya v Kitui County Government & 2 others; Kitui County Assembly & 2 others
(Interested Parties) (Petition E063 of 2020) [2024] KEELRC 1266 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1266 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E063 OF 2020**

**NJ ABUODHA, J
MAY 9, 2024**

BETWEEN

CLEMENT MULYUNGI MUNYITHYA PETITIONER

AND

THE KITUI COUNTY GOVERNMENT 1ST RESPONDENT

THE COUNTY SECRETARY, KITUI COUNTY 2ND RESPONDENT

THE GOVERNOR, KITUI COUNTY 3RD RESPONDENT

AND

THE KITUI COUNTY ASSEMBLY INTERESTED PARTY

KITUI COUNTY PUBLIC SERVICE BOARD INTERESTED PARTY

EVERLYNE KASYOKA MUSEMBI INTERESTED PARTY

RULING

1. The claimant/applicant herein filed a Notice of Motion application dated 23rd November, 2020 seeking to have the 1st, 2nd and 3rd respondents and the 2nd interested party held liable for contempt of court for willfully disobeying court orders issued on 9th October, 2020.
2. The application was supported by the affidavit of petitioner who deponed among others that;
 - a. That the Respondents and the 2nd Interested Party have disobeyed the orders of this court given on 9th October, 2020 staying and suspending the unlawful, illegal, and improper decision by the Respondents to appoint, and also restraining the Respondents by themselves, their servants, agents and/ or employees from effecting the unlawful, illegal, and improper appointment of Everlyne Kasyoka Musembi, the 2nd Interested Party herein, as the acting, substantive, temporary or “relieve” Accounting and Chief Officer of the Kitui County



Government Ministry of Environment and Natural Resources. Annexed hereto and marked “CMM 1” is a copy of the order.

- b. That I am informed by my advocates on record, which information I verily believe to be correct and true, that the said orders were served upon the Respondents and the 2nd Interested Party on 30th October, 2020 and its advocates on record on 29th October, 2020. Annexed hereto and marked “CMM 2” is a copy of the affidavit of service of the said order.
- (c) That even upon being served with the orders the Respondents and the 2nd Interested Party have deliberately disobeyed the same by allowing the Interested Party to continue to carry out the duties as Accounting and Chief Officer of the Kitui County Government Ministry of Environment and Natural Resources in an acting capacity in spite of the Court order barring her from so acting.
- (d) That I have personally witnessed her acting as such and even got evidence of this blatant disregard of court orders in the following instances:
 - i) On 2nd November 2020 the 2nd Interested Party forwarded a letter transfer of Abraham Mutisya Kova dated 29th October 2020 which she indicated and signed off as the acting Chief Officer of the Kitui County Government Ministry of Environment and Natural Resources. Annexed hereto and marked “CMM 3” is a copy of the said letter with the 2nd Interested Party’s signature embossment dated 2nd November 2020.
 - ii) On 3rd November 2020, the 2nd Interested Party issued a Memo of even date to the A/ Director, Energy and designated herself as the Acting Chief Officer of the Kitui County Government Ministry of Environment and Natural Resources. Annexed hereto and marked “CMM 4” is a copy of the said memorandum duly signed by the 2nd Interested Party.
 - iii) On 4th November 2020 the 2nd Interested Party approved payment of motor vehicle insurance as the Chief Officer of the Kitui County Government Ministry of Environment and Natural Resources. Annexed hereto and marked “CMM 5” is a copy of the memorandum for payment duly approved and signed by the 2nd Interested Party.
 - iv) On 29th October 2020, and 3rd November 2020 the 2nd Interested Party made several payments to various vendors while purporting to act as Chief Officer of the Kitui County Government Ministry of Environment and Natural Resources. Annexed hereto and marked “CMM 6” are copies of the said Ifmiss payments made by the 2nd Interested Party.
 - v) On 8th November 2020, the 2nd Interested Party represented the Acting Kitui County Minister Kitui County Government Ministry of Environment and Natural Resources in a tree planting exercise at the African Inland Church (AIC) Kunikila, Anglican Church of Kenya (ACK) St. Peter’s KwaNdonga and African Inland Church (AIC) Kyambusya as the acting Chief officer of the Kitui County Government Ministry of Environment and Natural Resources. Annexed hereto and marked “CMM 7” is the report and photos of this activity downloaded from the website of <https://www.thecountydiary.co.ke/kitui-ag-environment-chief-officer-madam-musembi-leads-tree-planting-exercise/>



- vi. On 12th November 2020 the 3rd Respondent was picture and reported by her Press as having hosted a team of Mining investors attended by the County Executive Committee Member for Environment and Mining Patrick Musau and Ag Chief Officer Evelyn Musembi, the 2nd Interested Party herein. Annexed hereto and marked “CMM 8” is a copy of the press release and accompanying photograph by the Kitui Governor’s Press.
 - vii. On 13th November 2020 the 2nd Interested party sent out invitations letters the acting Chief officer of the Kitui County Government Ministry of Environment and Natural Resources for a workshop that was scheduled to be held on 18th and 19th November 2020. Annexed hereto and marked “CMM 9” is a copy of the letter dated 13th November 2020 by the 2nd Interested Party.
- (e) That it is clear that the Respondent and the 2nd Interested party are acting in express disregard of the orders barring the 2nd Interested Party from acting as Chief officer of the Kitui County Government Ministry of Environment and Natural Resources which orders they are aware of having been served personally and through their advocates on record.
 - (f) That the 2nd and 3rd Respondents and the Interested Party ought to be committed to civil jail for a term of six (6) months for contempt of court for having deliberately disobeyed court orders.
3. The respondent and Interested party filed a replying affidavit through one Joshua Chepchieng’ who deponed among others that;
- a. That I am the County Secretary, Kitui County, and head of public service within the county, by virtue of my position. I am conversant with all the matters raised in this suit and the application, and I swear this affidavit on my behalf and on behalf of the other respondents and the second Interested Party.
 - b. That the County Government of Kitui was not served with the court order referenced in the application dated 23rd November, 2020 as alleged or at all.
 - c. That the Governor, County Government of Kitui and the second Interested Party have also informed me, which information I believe to be true, that they were also never served with any court orders either as alleged or at all.
 - d. That in any event, the court I have now seen filed together with the application seeks to stop the county government from implementing a decision that is illegal, unlawful and improper. As far as we know, this Honourable Court is yet to sit in judgment over the matters raised in this matter, and as such, there is no declaration of illegality in a way that could make the order applicable to the County. Once this Honourable Court declares the actions of the County illegal, the County Government will comply, subject to the right to explore all lawful avenues of challenging such an order.
 - e. That in any event, Evelyn Kasyoka, the second Interested Party made an accounting officer in the Ministry of Environment lawfully, three months before the order was apparently issued. The decision on who becomes an accounting officer is made by the Executive Committee Member in charge of Finance, who is not a party to this case, and whose administrative decision has not been challenged in any way.
 - f. That the Petitioner was transferred from the ministry of environment to the office of the Governor. He no longer has any stake in the ministry of Environment, and as such, it is



the County Government to determine who stays in charge of the affairs of the ministry. Government functions cannot grind to a halt. In any event, the court did not restore the Petitioner to the ministry of Environment, and as such, even if the functions complained of were not performed by the second Interested Party, they would still be performed by another member of staff designated by the County Government. Service delivery must continue, and the county gives people assignments on the basis of their ability.

- g. That the contempt application by the Petitioner constitutes a misapprehension of the order of the court. That order was also not served within three days as required by law, and our lawyers on record have advised me, which advice I believe to be correct, that the order lapsed, and cannot be enforced.
 - h) That the Petitioner has no access to records or documents at the ministry of Environment. He also has no access rights to the IFMISS system, and as such, he has no capacity to lawfully access the information he has placed before the court. He has also absconded duty without explanation. The County is taking disciplinary action against him for his absence from work. I have attached to this affidavit a true copy of a letter to show cause, and a letter stopping his salary on account of desertion of work. They are marked JC 1 and JC2.
4. The petitioner filed a supplementary affidavit in response to the respondent's affidavit and further averred that
- a. That I am informed by my advocates on record, which information I verily believe to be correct and true, that the said county government was served by email on 30th October 2020 through its last known email address. See the duly filled affidavit of service marked "CMM 2" in my supporting affidavit in this regard.
 - b. That the Kitui county has not denied that the email indicated in the affidavit of service is its official email, more so, having previously been served through this email with the court process herein.
 - c. That Joshua Chepchieng' has not denied that he was personally served through his email his email address as indicated in the affidavit of service as the 2nd respondent herein and neither has the 2nd Interested Party denied service in here personal email as indicated in the affidavit of service.
 - d. That I provided the email addresses to my advocates on record as I have personally used them to communicate with the Respondents and the 2nd Interested Party in my work communications with them.
 - e. That contrary to the assertions in paragraph 5 of the replying affidavit, the decision on who is made an accounting officer is not made by the Chief Officer in charge of finance but is done through the process prescribed by section 45 of the County Government's Act and only finalized by the said Chief Officer in charge of finance who is mandated by section 148 of the Public Finance Management Act to designate the person so appointed as the accounting officer.
 - f. That the thrust of my complaint is that I was not procedurally "transferred" from the Ministry of Agriculture and that the Respondent has not followed the appropriate provisions of the law in appointing the 2nd Respondent to the functions of that office.
 - g. That in as much any other person may perform those functions in the Ministry, the Respondent ought to follow the provisions of the law in appointing such a person to perform those functions for effective and lawful service delivery.



- h. That the 2nd Interested Party seems to contradict himself in paragraph 7 of the replying by admitting that they were served but not within 3 days of the order being made.
 - i. That in any event, I am further advised by my advocates on record, whose advice I verily believe to sound, that the provision of service of interim injunctive orders as indicated in Order 40 rule 40 of the Civil Procedure Rules, 2010 states the orders be served within 3 days that they are issued (not made) which was done in this instance.
 - j. That the bottom line is that the Respondents and the 2nd Interested Party have disobeyed the orders of this court given on 9th October, 2020 which were served upon them staying and suspending the unlawful, illegal, and improper decision by the Respondents to appoint, and also restraining the Respondents by themselves, their servants, agents and/ or employees from effecting the unlawful, illegal, and improper appointment of Everlyne Kasyoka Musembi, the 2nd Interested Party herein, as the acting, substantive, temporary or “relieve” Accounting and Chief Officer of the Kitui County Government Ministry of Environment and Natural Resources.
 - k. That contrary to the assertions in paragraph 8, I do have access to the information prescribed therein as an employee of the respondent and further the said information is public knowledge which is easily available.
 - l. That I was present on the online court proceedings on 16th November 2020 when my advocates on record raised the issue of disobedience of the court orders and the advocate on record for Respondents and 2nd Interested Party informed the court that they had no instructions on the orders issued.
5. In Jadia Mwarania v Cabinet Secretary, National Treasury & Others. Pet. E004 of 2023 [2023] eKLR this Court observed that contempt of Court is that conduct or action that defies or disrespects authority of the Court. Section 5 of the Judicature Act confers jurisdiction on superior Court to punish for contempt. Order 40 Rule (3) of the Civil Procedure Rules 2010 provides that in cases of disobedience or breach of any terms of a temporary injunction, the Court granting the injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months.
6. In the case of Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] KLR 828 Ibrahim J. (as he then was) stated:
- “It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is 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.”
7. Supreme Court of India in the case of T. N. Godavarman Thiru Mulpad v Ashok Khot and Another [2006] 5 SCC observed as follows:
- “Disobedience of this Court’s order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is



the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs.”

8. It is important to bear in mind that contempt of Court is in the nature of criminal proceedings and therefore proof of the cases against the alleged contemnor is higher than balance of probability as in civil cases but not beyond reasonable doubt as in criminal cases. This is because in contempt proceedings the liberty or property of the alleged contemnor is at stake if found guilty of contempt. In the case of *Gatharia K. Mutikika v Babarini Farm Limited* [1985] KLR 227, the Court observed 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 part 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 on 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.

9. The applicant’s complaint from the record is that he is opposed to the 2nd Interested party acting as Respondent’s Accounting and Chief Officer of the Kitui County Government Ministry of Environment and Natural Resources. According to the applicant, this Court issued on 9th October, 2020 staying and suspending the unlawful, illegal, and improper decision by the Respondents to appoint, and also restraining the Respondents by themselves, their servants, agents and/ or employees from effecting the unlawful, illegal, and improper appointment of Everlyne Kasyoka Musembi, the 2nd Interested Party herein, as the acting, substantive, temporary or “relieve. The applicant previously held the contested position but was transferred to the office of the Governor. The respondent has further averred that the orders alleged to be violated were issued three months after the appointment of the 2nd Interested party. This has not been disputed by the applicant. If the foregoing is true then it is not clear that the respondent and the interested party are in contempt.
10. The applicant therefore appears to the Court to have been peeved by his transfer to the Governor’s office and want to use the court process and contempt proceedings to grind to a halt the operations in the office he was transferred from. This the Court cannot be a party to.
11. As previously observed, contempt proceedings are quasi-criminal in nature and proof thereof ought to be of higher standard almost to the level of proof in criminal cases. There is also the issue of service of the orders allegedly disobeyed. Whereas the applicant alleges service via email, the respondent and the third party have denied service as alleged. It was therefore incumbent on the applicant to show that indeed the address used was the respondent’s last known address and the applicant ought to have explained why he chose to serve the respondent whom he was still working for via email. In allegations of contempt, personal service is preferable unless it can be demonstrated that the same



cannot reasonable be effected. In this particular case, the Court is not persuaded that there is any contempt.

12. The application is therefore found without merit and is hereby dismissed with costs.

13. It is so ordered

DATED THIS 9TH DAY OF MAY, 2024

DELIVERED THIS 9TH DAY OF MAY, 2024

ABUODHA NELSON JORUM

JUDGE

