



**Universities Academic Staff Union (UASU) Moi University Chapter & 2 others  
v Moi University; Kosgey & 3 others (Contemnor) (Employment and Labour  
Relations Cause E020 of 2023) [2024] KEELRC 1499 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1499 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E020 OF 2023  
MA ONYANGO, J  
JUNE 6, 2024**

**BETWEEN**

**UNIVERSITIES ACADEMIC STAFF UNION (UASU) MOI UNIVERSITY  
CHAPTER MOI UNIVERSITY CHAPTER ..... 1<sup>ST</sup> CLAIMANT  
KENYA UNIVERSITIES STAFF UNION (KUSU) MOI UNIVERSITY  
CHAPTER ..... 2<sup>ND</sup> CLAIMANT  
KUDHEIHA, MOI UNIVERSITY CHAPTER ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**MOI UNIVERSITY ..... RESPONDENT**

**AND**

**PROFESSOR SAAC SANGA KOSGEY ..... CONTEMNOR  
PROFESSOR ENG H KIRIMI KIRIAMITI ..... CONTEMNOR  
PROFESSOR SIMEON MINING ..... CONTEMNOR  
PETRONILA C CHEPKWONY ..... CONTEMNOR**

**RULING**

1. By an application dated 22<sup>nd</sup> November 2023, the Claimants sought for orders that:
  - a. This Application be certified urgent, its service dispensed with and the same be heard on priority basis at first instance.
  - b. The Claimants are granted leave to commence contempt proceedings against the contemnors herein as set out in the prayers hereunder.



- c. A Notice to show cause is issued to the Contemnors to show cause why they should not be cited for Contempt of court pursuant to breach of the Court order issued on 9<sup>th</sup> August 2023
  - d. The Contemnors herein are cited for contempt of court for willful disobedience of the Court order issued on 9<sup>th</sup> August 2023 and committed to civil jail as envisaged under the Penal Notice endorsed on the subject court order
  - e. Costs of the Application are awarded to the Claimants.
2. The grounds relied upon are that this court issued an order on 9<sup>th</sup> August 2023 staying the implementation of Clause 9 of the *Statute XXIX of Moi University Statutes, 2013* (Revised 2021) and the retirement notices issued to the Claimants' members, that the court order was served upon the Respondent herein and by extension the Contemnors herein on 14<sup>th</sup> August 2023, that the Respondent and by extension the Contemnors have confirmed knowledge of the subject Court Order vide the application dated 19<sup>th</sup> September 2023 in which they sought to set aside the Order, that the Respondent through the Contemnors has declined to comply with the Order of this court, that Respondent through the Contemnors have continued to implement the Statutes and the Retirement Notices in blatant disregard and breach of the Court Order, that the Respondent through the Contemnors have declined to pay salaries to the Claimants' members pursuant to the Retirements Notices in breach of the Court Order, that failure to comply with the Court Order has thrown the Claimant's members employment into limbo, that the Claimant's members have been exposed to the vagaries of unemployment despite this court having issued an order to protect their employment hence making a mockery of the instant court proceeding, that the Claimant's affected members have been forced to go without a salary for more than two months hence depriving them of their only source of livelihood, a situation that has exposed them and their families to extreme hardship, suffering and destitution, that the Claimants' members cannot access their retirement benefits since their constitutive instruments for the Pension Scheme and the Provident Fund authorizes for their pay outs after 30<sup>th</sup> June 2024, that the Claimants' and their families have been exposed to extreme psychological frustration and mistreatment by the Respondent and the Contemnors offensive actions and they stand a high risk of tipping into depression which is an infringement to their right to good health as enshrined in the Constitution, that there is no certainty on compliance with any future orders and decrees by the Respondent and the Contemnors if their instant breach is left unabated and lastly, that the Claimants and their members will suffer an irreparable harm if the orders sought herein are not granted.
  3. The application is opposed. The alleged Contemnors filed their respective Replying Affidavits sworn on 8<sup>th</sup> December 2023.
  4. In those affidavits, the alleged Contemnors aver that the application before court has been brought in bad faith and is intended to mislead the court into issuing orders against the alleged Contemnors on account of the alleged contempt contrary to the true facts obtaining in the matter. They state that the Respondent rolled out a retirement programme for its staff in accordance with the institution statutes in consultation with the Claimants and commenced the implementation of the programme in line with Clause 9 of the *Statute XXIX of the Moi University Statutes, 2013* by issuing retirement notices to its employees who are the Claimant's members. They further aver that despite the Claimant's participation in the rollout of the retirement programme, some of the Respondent's employees who are members of the Claimant were dissatisfied with the process and or with the implementation of the said Clause 9 of Statute XXIX of the Moi University Statutes and moved this court vide the instant suit in which they sought amongst other prayers, stay of implementation of the said Clause.



5. It is their contention that on 30<sup>th</sup> August 2023, following an Internal Memo from the Institution's legal department, the Vice Chancellor in obedience of the Court order dated 9<sup>th</sup> August 2023, issued a directive staying the implementation of Clause 9 of *statute XXIX of the Moi University Statutes, 2013* (revised 2021) which Order was duly complied with. The alleged Contemnors therefore dispute that they have disobeyed the court order.
6. According to them, the persons listed by the Claimants in the supporting affidavit as having been affected by the alleged disobedience of the Court order had been issued with notices before the court order was served upon the institution. That after the receipt of the said court order the Respondent did not undertake any further action on account of the court order.
7. In response to the allegation by the Claimants that the alleged Contemnors were withholding retirement benefits of the Claimants members contrary to the Court order, the alleged Contemnors aver that they are not officers of the Pension Scheme and the Provident Fund and that as such, the responsibility with regard to retirement benefits lies with the Pension Manager in the respective Pension Schemes and not themselves.
8. It is further contended that the court order was only with respect to staying of the Retirement Notices which the Respondent has fully complied with.
9. In a rejoinder through a further affidavit sworn on 27<sup>th</sup> February 2024 by Mary Chepkwemioi, the 2<sup>nd</sup> Claimant's Secretary, the Replying affidavits sworn by the alleged Contemnors are founded on falsehoods and misrepresentation of facts. She deposes that the court order issued on 9<sup>th</sup> August 2023 stayed any form of implementation of Clause 9 of the *Statute XXIX of the Moi University Statutes 2013* (Revised 2021) and the Retirement Notices issued to the Claimant's members.
10. It is averred that upon being served with the instant application, the Respondents proceeded to issue Notices for Resumption of duty to the affected employees in an attempt at purging the contempt. The Claimants aver that the notices issued to some of the affected employees are meant to create an impression that they had exited service hence are being re-engaged which is not the intention of the subject court order.
11. The Claimants aver that the affected employees have not been paid their salaries and allowances for the months of August to December 2023 which is a continuous blatant contempt of the court order.
12. The application was disposed of by way of written submissions. Both parties filed their submissions on 28<sup>th</sup> February 2024.

### **The Claimants' Submissions**

13. In their submissions dated 26<sup>th</sup> February 2024, the Claimants submit that they have discharged their burden of proof with respect to the allegation of contempt against the cited Contemnors to the required standard. In this regard, they submit that cited Contemnors do not dispute the existence of the Court Order and neither do they allege lack of clarity of existence of an intra-ambiguity in the Order.
14. The court was thus urged to make a finding that the alleged Contemnors acted in contempt of the Order of this court and that the nature of the contempt is inexcusable. That they must bear the consequences of the contempt.

### **The Alleged Contemnors' Submissions**

15. The Alleged Contemnors in their submissions identified the issues for determination to be:



- a. Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Contemnors are guilty for contempt of court; and,
  - b. Whether costs should be on provided for.
16. Regarding the first issue, it is submitted that the 1<sup>st</sup> Alleged Contemnor who is the Vice Chancellor of the Respondent, upon receiving the court order, took steps to give effect to the court order by halting the implementation of clause 9 of the Statutes by circulating and ensuring dissemination of the information to the relevant departments. He submits that he acted in accordance with the court order and cannot be faulted.
  17. With respect to the 2<sup>nd</sup> Alleged Contemnor, who is the Deputy Vice Chancellor-Administration, Planning and Strategy, it is submitted that upon being given directions by the Vice Chancellor to notify the other departments of the existence of the court order, he acted according to the said directions. He submits that there is no fault on his part since he acted to ensure that the implementation of clause 9 of *Statute XXIX* had been put on halt to ensure compliance with the court order.
  18. As for the 3<sup>rd</sup> Alleged Contemnor, it is submitted that as the Registrar of the Respondent, he took the necessary steps to ensure compliance with the court order by ensuring that all departments were aware of the existence of the said order stopping the implementation of Clause 9 of the Statutes thereby halting the process.
  19. Lastly, with regard to the 4<sup>th</sup> Alleged Contemnor, the Respondent's senior legal officer, it is submitted that she prepared a legal opinion and caused it to be forwarded to the Vice Chancellor which opinion was to give effect to the court order. It is thus submitted that there was no breach of the court order by the Alleged 4<sup>th</sup> Contemnor.
  20. In sum, it is the Alleged Contemnors' submission that the annexed notices which the Claimants based their application are irrelevant to the instant application because the said notices were issued way before the court order came into existence.
  21. The Alleged Contemnors maintain that they have not breached the court order and they thus prayed that the instant application be dismissed with costs.

### **Determination**

22. I have considered the instant application, the rival affidavits as well as the submissions filed by the parties. In my view, the issue that falls for this court's determination is whether the Alleged Contemnors are guilty of contempt of this court's order issued on 9<sup>th</sup> August 2023.
23. In an application of this nature, the starting point is for a party alleging disobedience of a court order to demonstrate that the alleged Contemnor willfully and deliberately disobeyed the court order. In *Gatharia K. Mutikika v Babarini Farm Ltd* [1985] KLR 227 it was held 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 heard to process 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 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.”

24. In the instant application, the Claimants have alleged that the cited Contemnors have disobeyed the court order issued on 9<sup>th</sup> August 2024. However, from a perusal of the affidavit in support of the application before court, there is no documentation that has been placed before this court for it to satisfy itself that the said orders were indeed disobeyed.
25. In fact, from the notices of retirement annexed to the 4<sup>th</sup> cited contemnors Replying affidavit sworn on 8<sup>th</sup> December 2023, there is no doubt that the said notices were issued way before the court order was made on 9<sup>th</sup> August 2023.
26. In the case of *Peter K. Yego & Others v Pauline Wekesa Kode* ACC NO. 194 of 2014 the court held that:-  
“it must be proved that one had actually disobeyed the court order before being cited for contempt”
27. From the foregoing, it is crystal clear that the Claimants have not demonstrated that cited Contemnors deliberately disobeyed the Court order issued on 9<sup>th</sup> August 2023 in order for them to be cited for contempt of court.
28. The upshot of the foregoing is that the application dated 22<sup>nd</sup> November 2023 is devoid of merit and the same is hereby dismissed with. Each party will, however bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 6TH DAY OF JUNE, 2024**

**MAUREEN ONYANGO**

**JUDGE**

