



**Kiuvu & another v Machakos County Assembly Service Board (Petition
E004 of 2023) [2024] KEELRC 1909 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1909 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
PETITION E004 OF 2023**

BOM MANANI, J

JULY 25, 2024

**IN THE MATTER OF ARTICLES 2, 3, 10, 41, 47, 174, 179,
185, 224, 226 AND 236 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF AN APPLICATION TO CITE THE RESPONDENTS FOR CONTEMPT

AND

**IN THE MATTER OF THE UNFAIR, UNPROCEDURAL AND
UNLAWFUL PROCESS OF REMOVAL FROM THE OFFICE OF
THE CLERK OF THE COUNTY ASSEMBLY OF MACHAKOS**

BETWEEN

KENNEDY OWITI KIUUVU 1ST PETITIONER

JOSEPH MUTISYA LABAN 2ND PETITIONER

AND

MACHAKOS COUNTY ASSEMBLY SERVICE BOARD RESPONDENT

RULING

Background

1. Before the court is the Petitioner's application dated 29th January 2024 through which he seeks for, inter alia, the following orders:-
 - a. That the court finds Anne M. Kiusya, Felix Mutunga Ngui, Joanna Munyao, Alex Nyamai Kitili, Janet Mutua and Dennis Musyoka, the chairperson and members of the Respondent in contempt of the court order which was issued on 27th November 2023.



- b. That the court be pleased to commit the said individuals to civil jail for a period of not less than six (6) months or does impose such other punishment on them as it deems fit for the willful disobedience of the aforesaid court order.
 - c. That the court be pleased to declare the aforesaid individuals as unfit to hold public office for disobedience of the aforesaid court order.
2. The events which gave rise to the application are not difficult to discern. According to the record, the Petitioner was appointed as the Clerk to the Machakos County Assembly on 18th May 2022. By virtue of section 12 (4) of the [County Governments Act](#), he was to also serve as the Secretary to the Respondent.
3. The Petitioner contends that as part of his mandate, he was required to procure facilitation for the Respondent's members as and when necessary. He contends that this included procuring for the members' local and foreign travel.
4. The Petitioner contends that sometime in October and November 2023, the Respondent's members proposed to travel to Burundi to attend the East Africa Law Society Conference. As such, they requested him to facilitate the travel.
5. The Petitioner contends that he declined the request as it had not been budgeted for. Further, he avers that the Respondent had allegedly exhausted the budget for travel for the financial year.
6. The Petitioner contends that this development infuriated the members of the Respondent. As a result they issued him with a letter of suspension from office as from the night of 14th November 2023. He contends that contemporaneous with the suspension, the Respondent served him with charges for his removal from office.
7. The Petitioner contends that on 15th November 2023, the Respondent appointed an interim Clerk for the County Assembly. The appointment was published through Gazette Notice No. 15497.
8. The Petitioner says that these events signified the Respondent's resolve to unlawfully remove him from office. As such, he moved to court to seek orders to prevent it (the Respondent) from actualizing its illegitimate scheme.
9. The Petitioner contends that on 27th November 2023, he secured interim conservatory orders which stayed the Respondent's decision to suspend him from office. He avers that the orders were served on the Respondent the following day. However, the Respondent still went ahead with the process of his removal from office in utter disregard of the aforesaid orders. As such, he argues that the members of the Respondent acted in defiance of a lawful court order for which they ought to be punished.
10. The Petitioner filed an affidavit by one Dominic Ndonge, a Member of the County Assembly of Machakos to support his application. The affidavit seeks to clarify when the Respondent's Notice of Motion to remove the Petitioner from office was tabled before the House Business Committee of the County Assembly.
11. In response to the application, the Respondent filed a replying affidavit sworn by Anne M Kiusya, its chairperson. It avers that the application is frivolous and does not meet the threshold for an application for contempt of court.
12. The Respondent avers that there was no personal service of the impugned order on its members. Further, it contends that the order in contention did not contain a notice of penal consequences. As such, it cannot be the basis for the application for contempt of court.



13. The Respondent further argues that the application for contempt was not personally served on the alleged contemnors. As such, the orders sought cannot be issued.
14. The Respondent admits that it served the Petitioner with a letter of suspension dated 14th November 2023. It contends that the said letter required the Petitioner to appear before it on 28th November 2023 at 10.00 AM to respond to various charges against him. However, he allegedly failed to turn up for the disciplinary session on the appointed date and time. Consequently, the session proceeded in his absence resulting in his eventual removal from office by the County Assembly of Machakos, a separate statutory body.
15. The Respondent contends that the Petitioner moved to court to stay his suspension from office instead of attending the disciplinary session scheduled for 28th November 2023. As such, the session proceeded on the appointed date and time without his participation and without the Respondent being aware that he had moved to court.
16. The Respondent avers that the email which was used to send a copy of the order to its chairperson did not indicate who its author was. As such, it ought not to be relied on to uphold the instant application for contempt of court.
17. The affiant in the replying affidavit contends that the email was in any event sent to her on 28th November 2023 at 11.27 AM and she only came to see it at 3.00 PM on that day. She contends that by this time, the disciplinary proceedings against the Petitioner which were scheduled for 10.00 AM had already been concluded.
18. The Respondent contends that its attention was drawn to the court order after it had already submitted the Notice of Motion to remove the Petitioner from office to the County Assembly's Speaker. As such, it was no longer seized of the matter at the time and was functus officio.
19. The Respondent contends that the County Assembly which was seized of the removal proceedings when the order was served is not a party to the instant proceedings. As such, it was not bound by the court order.

Issues for Determination

20. After examining the application, the replying affidavit, the supplementary affidavit and submissions by the parties, the issues that emerge for determination are:-
 - a. Whether the Order of 27th November 2023 was served on the Respondent.
 - b. If the answer to the above question is in the affirmative, whether at the time of service of the order, the disciplinary session by the Respondent against the Petitioner had been concluded and the matter escalated to the County Assembly of Machakos.
 - c. If the answer to the above question is in the affirmative, whether the Respondent had become functus officio at the time it was served with the order in question and the County Assembly of Machakos had legally become seized of the matter.
 - d. Whether the Respondent's members are in contempt of the court order of 27th November 2023.

Analysis

21. Regarding the first question, it is evident from the record that the Petitioner obtained a valid court order on 27th November 2023. The record shows that the order was delivered to the Respondent's



- chairperson through her email address on 28th November 2023 at 11.27 AM. As a matter of fact, the affiant to the replying affidavit concedes this fact through the affidavit.
22. The affiant to the replying affidavit avers that the author of the email was undisclosed. However, nothing turns on this omission. The fact of the matter is that the order was delivered through email on the material date.
 23. Under Order 22 B(1) of the Civil Procedure Rules, service of court processes through email is deemed as proper once the processes are sent to the recipient's last known email address. Further, the time of receipt of the process is deemed to be the time it (the process) was delivered to the recipient's email. As such, the Respondent is deemed to have been served with the order in question on 28th November 2023 at 11.27 AM.
 24. The order was delivered to the Respondent's chairperson. Under Order 5 rule (3) (a) of the Civil Procedure Rules, service of court processes on a statutory body may be effected on its secretary, director or other principal officer. The chairperson of the Respondent is one of its principal officers. As such, service of the order on her is deemed as service on the Respondent. Consequently, the impugned order is deemed to have been properly served on the Respondent.
 25. The Respondent avers that at the time of service of the order, it had concluded the disciplinary session against the Petitioner and forwarded the matter to the County Assembly for further action. It contends that its disciplinary session was scheduled for 28th November 2023 at 10.00 AM and was concluded at 10.20 AM. Yet, the order was emailed to its chairperson at 11.27 AM on that day. At this time, the Respondent contends that it had already submitted the matter to the County Assembly of Machakos for further processing in accordance with the applicable law.
 26. The record shows that the Respondent issued the Petitioner with a letter dated 14th November 2023 in which it raised a plethora of accusations against him. Further, it (the Respondent) notified the Petitioner to appear before it on 28th November 2023 at 10.00 AM to respond to the accusations.
 27. The Respondent contends that on the aforesaid date and at the appointed time, the Petitioner did not appear before it. Consequently, it concluded the disciplinary session by 10.20 AM and lodged a Notice of Motion for his removal with the County Assembly in line with section 23 of the [County Assembly Services Act](#).
 28. Section 23 of the [County Assembly Services Act](#) empowers a County Assembly Service Board to remove a County Assembly Clerk from office on a number of grounds. However, the County Assembly Service Board can only execute this function through the County Assembly.
 29. The County Assembly Service Board discharges this function by forwarding a Notice of Motion proposing the removal of the Clerk to the County Assembly. The County Assembly then constitutes a Select Committee to inquire into the matter and ascertain the charges against the Clerk. If the Select Committee confirms the charges against the Clerk, the County Assembly will revoke his (the Clerk's) appointment.
 30. In the case before me, there is evidence that the Petitioner was asked to appear before the Respondent on 28th November 2023 at 10.00 AM to respond to the charges against him. There is evidence that he did not.
 31. There is evidence that the Petitioner served the Respondent's chairperson with an order staying his suspension from office on 28th November 2023 at 11.27 AM. This was more than one hour after the Respondent had concluded its disciplinary session against him.



32. There is evidence that the Respondent forwarded a Notice of Motion to the County Assembly of Machakos on 28th November 2023. There is evidence that the County Assembly of Machakos was moved by one Felix Mutunga on the material date to set up a Select Committee to investigate the Petitioner.
33. It would appear that at the time the court order was served on the Respondent at 11.27 AM on 28th November 2023, the matter had already moved from its (the Respondent's) purview to the County Assembly of Machakos. This is because it had already dispensed with the matter in the absence of the Petitioner at 10.20 AM on the same day.
34. Therefore and in terms of section 23 of the *County Assembly Services Act*, the Respondent was no longer seized of the matter. Having forwarded the matter to the County Assembly at 10.20 AM, it (the Respondent) became functus officio in respect of it. In the premises, it cannot be said to have defied the impugned court order which was delivered at 11.27 AM.
35. Although the Petitioner argues that he served the order through WhatsApp, no evidence of this was tabled before the court. It would have been better if he had availed an extract of the WhatsApp text to affirm this averment. This was necessary not only to affirm service through this platform but also to show the time of such service. In the absence of this evidence, the averment that the Respondent was served through WhatsApp remains a mere allegation which is unsupported by cogent evidence.
36. It is imperative to always keep in mind that the offense of contempt of court is a quasi-criminal offense which attracts severe penal consequences. A finding of guilt for the offense has the potential of depriving one of his right to liberty. As such, the standard of proof for establishing the offense is higher than that of a balance of probabilities. In my view, I do not think that the Petitioner has presented cogent evidence in support of his application to surmount this threshold.
37. Even if the court had arrived at the conclusion that the order was served on the Respondent through WhatsApp, it is apparent from the affidavit by the process server that this was done around 11.27 AM on 28th November 2023. As such, the WhatsApp service was effected after the Respondent had finalized the disciplinary session which had been convened at 10.00 AM on the same day.
38. At the time the order was served through email, the matter was already with the County Assembly of Machakos which is a distinct legal entity from the Respondent. As the record shows, the said County Assembly is not a party in the instant Petition. As such, it cannot be said that it (the County Assembly) was affected by the order.
39. It is true that the affiant to the replying affidavit is both the Chairperson of the Respondent and the Speaker of the County Assembly of Machakos. However, the two entities are distinct legal persons. As such, the Petitioner cannot rely on the service of the order on the said affiant after 10.00 AM on 28th November 2023 to argue that the County Assembly ought not to have finalized his removal even when it is apparent from the record that the said County Assembly was not party to the Petition.
40. I have considered the averments by one Dominic Ndonge on the dispute. He avers that he sits in the House Business Committee of the County Assembly of Machakos. He contends that the Committee received the Notice of Motion to remove the Petitioner from office at 4.00 PM on 28th November 2023.
41. What the said Dominic Ndonge fails to appreciate is that the law requires the Respondent to lodge the Notice of Motion for removal of the Clerk with the Speaker of the County Assembly. It is the Speaker who then presents the Notice of Motion to the House Business Committee of the County Assembly for further processing.



42. Once the Speaker of the County Assembly receives the Notice of Motion from the County Assembly Service Board, the County Assembly is deemed as seized of the matter. Therefore, the fact that the Speaker of the County Assembly lodged the Notice of Motion with the House Business Committee at 4.00 PM on the material date does not necessarily confirm that the Respondent submitted the said Motion to the Speaker at that time. It could have been received earlier. It was up to the Petitioner to establish at what time the Respondent handed over the Motion to the Speaker.
43. Despite the fact that the Speaker chairs the Respondent, she exercises a distinct statutory mandate from that of chair of the Respondent when she is processing the Notice of Motion in her capacity as Speaker of the County Assembly. She does not do so as chairperson of the Respondent. She does so as the Speaker of the County Assembly.
44. At this time, the function of the Respondent to forward the Notice of Motion to the County Assembly has already been executed and the Respondent rendered functus officio. As such, despite her dual roles, the Speaker cannot reverse the process that had already been undertaken by the Respondent.
45. The Respondent has raised another pertinent issue about the order that was served through email. It is argued that the order did not have a notice of penal consequences. As such, even if it was demonstrated that it was served before the impugned proceedings, it would not have provided a suitable basis for the application for contempt of court.
46. In *John Mwangi Muhia & 2 others v Justus Gituma t/a Dona Snacks & another* [2014] eKLR, the Court of Appeal observed that an order that is the subject of contempt of court proceedings must have been endorsed with a notice of penal consequences in order to comply with the applicable rules. As such, failure to endorse the order with the aforesaid notice would be fatal to a subsequent application for contempt. I am bound by this finding. As such, the instant application has to fail on this ground.

Determination

47. The upshot is that the court finds that its order of 27th November 2023 was served on the Respondent on 28th November 2023 at 11.27 AM after it had already closed the disciplinary session against the Petitioner at 10.20 AM on the same day. Therefore, at the time the order was delivered to the Respondent, it had been overtaken by events.
48. As such, the Respondent's members cannot be said to have acted in contempt of the order. They were not seized or aware of it at the time they resolved to forward the Notice of Motion for removal of the Petitioner to the Speaker of the County Assembly of Machakos.
49. In any event, the impugned order was not endorsed with a notice of penal consequences. As such, it does not provide a suitable basis for the instant application.
50. Consequently, the application for contempt of court against the Respondent is unmerited.
51. Accordingly, it is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 25TH DAY OF JULY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent



Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

JUDGE

