



Onyango v Speaker County Assembly of Migori & 2 others (Cause E088 of 2023) [2024] KEELRC 1863 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1863 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E088 OF 2023
CN BAARI, J
JULY 18, 2024**

BETWEEN

TOM OPERE ONYANGO PETITIONER

AND

THE SPEAKER COUNTY ASSEMBLY OF MIGORI 1ST RESPONDENT

MIGORI ASSEMBLY SERVICE BOARD 2ND RESPONDENT

CLERK, COUNTY ASSEMBLY OF MIGORI 3RD RESPONDENT

RULING

1. This ruling relates to the Claimant's motion dated 15th January, 2024, wherein, the Applicant/Claimant seeks the following orders: -
 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. That the 1st Respondent (Charles Owino Likowa), 3rd Respondent (Vincencia Awino) and other members of the 2nd Respondent to wit: Ken Ngaro, David Sarara, Philip Olela and Lonah Aloo, be punished for being in contempt of Court by being jailed for up to 6 months for disobeying the Court order dated 20th December, 2023, by proceeding to advertise in the Standard Newspaper of 08.01.2024, the recruitment of the Clerk of the County Assembly of Migori.
 - v. That the Respondents be condemned to pay the costs of the suit.
2. The application is supported by grounds on the face thereof and the affidavit of Tom Opere Onyango, the Applicant/Claimant herein sworn on 15th January, 2024.



3. The crux of the motion is that on 20th December, 2023, this Court issued an order of injunction restraining the Respondents from implementing the resolution of the County Assembly of Migori dated 14th December, 2023, revoking the appointment of the Claimant as the Clerk of the County Assembly of Migori, but which position the 1st Respondent on behalf of the 2nd and 3rd Respondents, advertised in the Standard Newspaper of 8th January, 2024, despite the Court order.
4. It is on the basis of the alleged disobedience that the Claimant seeks that the Respondent be held in contempt of court.
5. The Respondents filed grounds of opposition dated 30th January, 2024, and an affidavit verifying grounds of opposition sworn on the same date, opposing the Claimant Motion application. The Respondents' position is that persons sought to be cited for contempt are not parties to this suit and further argues that public offices/bodies are different from the persons that hold them.
6. It is the Respondents' further argument that the persons named and against whom contempt orders are sought, be struck out from these proceedings as the Court would first have had them joined to the suit before they can be cited for contempt.
7. The Respondents further argue that the motion herein has been brought under the wrong provisions of the law, hence the jurisdiction of the court has not been properly invoked.
8. The Respondents further submit that no clear case of willful disobedience of the orders of 20th December, 2023, has been established on the part of the persons named therein, and the prayer ought thus to be declined.
9. It is submitted that the prayer herein is drawn as if the persons named have already been adjudged guilty of contempt and all the court needs to do is impose sentence when this is not the case.
10. That the prayer sought cannot be granted in view of Section 15 of the *County Assembly Services Act* which demands that proceedings be commenced in the name of the Board and notices and process be served upon the Secretary to the Board.
11. It is the Respondents position that there is no other known way for an employer to commence competitive recruitment other than through advertisement, and hence the County Assembly Service Board of Migori simply followed the law, and cannot be held to be in contempt.
12. It is their further position that at the time the advertisement was made, no orders were issued and served upon the 2nd Respondent and the County Assembly Service Board or any of its organs barring them from sending out the advertisement.
13. That no statutory provision has been pointed out requiring the persons sought to be held in contempt to implement the orders of 20th December, 2023.
14. The motion was canvassed through written submissions which have been duly considered.
15. The Respondents pray that the motion be dismissed.

Analysis and Determination

16. I have considered the motion, grounds, supporting affidavit, the grounds of opposition and the submissions by both parties. Only one issue presents for determination, and which is whether the Respondents are in breach of the Court order issued on 20th December, 2023.



17. The *Black's Law Dictionary* (Ninth Edition) defines contempt of Court as:
- “Conduct that defies the authority or dignity of a court, and because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
18. In *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR, the Court held that to succeed in an application for contempt, an Applicant must prove that the terms of the order were clear, unambiguous and were binding on the defendant, the defendant had knowledge of/ or proper notice of the terms of the order, the defendant has acted in breach of the terms of the order and the defendant's conduct was deliberate.
19. The order subject of this proceedings reads in part: -
- “That pending the hearing and determination of this application interparties, an interim order of injunction be and is hereby issued restraining the Respondents from implementing the resolution of the County Assembly of Migori dated 14/12/2023 revoking the appointment of the Claimant as the Clerk of the County Assembly of Migori.”
20. The Respondents proceeded to seek to fill the position of Clerk, County Assembly of Migori vide advertisements placed in the Standard News Paper on 8th January, 2024. The question is whether the advertisements contravened the orders subject of the instant motion.
21. The orders of 20th December, 2023, barred the Respondents from implementing the resolution made by the County Assembly of Migori on 14th December, 2023, revoking the appointment of the Claimant as the Clerk of Migori County Assembly. The question is whether this order barred the advertisement or recruitment Clerk of Migori County.
22. While I pose this question, I note from the record that the Claimant in a motion application dated 15th January, 2023, sought further orders seeking to suspend the effect of the advertisements subject of this motion, and which orders, the Court granted albeit temporarily on 17th January, 2024.
23. In *Gatharia K. Mutikika v Babarini Farm Limited* [1985] KLR 227, the court tacitly described the seriousness of contempt proceeding in the following words:
- “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.”

24. In my view, the orders of 20th December, 2023, related only to the implementation of the County Assembly Resolution of 14th December, 2023, while the latter orders of 17th January, 2024 were specific to the advertisement of the position of Clerk of Migori County, for if they had the same meaning plainly translated, the Claimant would not in my view have required to seek the latter orders.
25. It is therefore true that while the orders (both sets) were binding on the Respondents, and the Respondents had knowledge of the subject orders, this Court cannot certainly say that the terms of the order were clear and unambiguous or that the defendant’s conduct was deliberate.
26. A contempt motion on the subject herein, would have been better premised on the orders of 17th January, 2024, which expressly stayed the advertisement of the position of Clerk, as opposed to the orders of 20th December, 2023, which only barred the implementation of the resolution of the County Assembly.
27. By dint of the foregoing, I am reluctant to find the Respondents guilty of contempt by reason of the orders subject of the motion being anything but clear.
28. I find the motion devoid of merit, and is hereby dismissed with no orders on costs.
29. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 18TH DAY OF JULY, 2024.

C. N. BAARI

JUDGE

Appearance:

N/A for the Claimant/Applicant

Ms. Achieng present h/b for Mr. Okong’o for the Respondents

Ms. Anjeline & Debra - C/As

