



**Kenya County Government Workers Union Bungoma County Branch v  
Bungoma County Public Service Board & another; Muyundi (Applicant)  
(Petition 1 of 2019) [2024] KEELRC 2335 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2335 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
PETITION 1 OF 2019  
JW KELL, J  
SEPTEMBER 25, 2024**

**ON ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS AS WELL AS ENFORCEMENT OF THE SAME RIGHTS**

**AND**

**IN THE MATTER OF THE SECTION 57, 58,(3B & 5) , 59,60 ,74  
OF THE COUNTY GOVERNMENT ACT , 2012, SECTION 107(1&  
2) OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012, AND  
SECTION 9(C) , 17, 20(2) OF THE PUBLIC ETHICS ACT, 2003**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATION  
ACT, EMPLOYMENT ACT AND CONTRACT ACT**

**BETWEEN**

**KENYA COUNTY GOVERNMENT WORKERS UNION BUNGOMA COUNTY  
BRANCH ..... PETITIONER**

**AND**

**BUNGOMA COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT  
THE COUNTY GOVERNMENT OF BUNGOMA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MOSES MAELO MUYUNDI ..... APPLICANT**

***(ON APPLICANT’S APPLICATION DATED 23RD JANUARY 2024)***



## RULING

### Background To The Application

1. On the 13<sup>th</sup> May 2020 the Court (Justice Nduma Nderi presiding ) delivered judgment in Employment and Labour Relations Court at Bungoma in respect to *Petition No. 1 of 2019* in which the Petitioner succeeded and the Court granted the following reliefs to the petitioner:-
  - a. The continued employment of the listed 463 Grievants /members of the petitioner by the respondents on the casual basis is a violation of Section 5, 35 and 37 of the *Employment Act, Cap 11 of 2007* and violates Articles 27,28,41 and 232 of *the Constitution* of Kenya ,2010.
  - b. The Court do hereby direct the Respondents to place all the affected employees referred to above on payroll and apply to each one of them the minimum terms and conditions of service as provided under parts II, III, IV,V and VI of the *Employment Act, cap 11 of 2007*.
  - c. The Respondents be and are hereby ordered to compute, file and pay arrears salary due and owing to all the Grievants , named in this petition under their employment within 60 days.
  - d. Costs of the petition do follow the event.
2. The Respondents, while execution of the judgment and decree of the Court was pending filed an application for review of the judgment and after consideration of the application, the responses and the law this Court rendered its ruling on the application for review and at paragraph 80 stated:- “In the upshot, though I may have held a different opinion or take different approach on the petition sitting as trial judge, I am now wearing cap of review of judgment of concurrent judge. I have no authority to overrule the judge. The parties have remedy of appeal for another opinion. I decline the prayer for review of the judgment of Justice Nduma, a concurrent judge dated 13<sup>th</sup> May 2020 for reasons of the application being on points of law, and on extraneous issues which require exercise of appellate jurisdiction and for lack of new evidence as required under the law.”
3. The Court further issued procedural orders in public interest as follows:- “ Any further sufficient reason in public interest .
81. I have considered the acrimony of the deponent Moses Maelo Muyundi and the petitioner. In order to protect interest of the workers under the judgment and further to clarify on the implementation of placement on payroll and payment of the said wages. I do exercise my judicial discretion and order the respondents jointly and severally to comply with the decision of the Court as per judgment of Justice Nduma of 13<sup>th</sup> may 2020 and file a report within 60 days on the compliance and for avoidance of doubt the list of 463 persons as per the following directions:-
  - a. The 1<sup>st</sup> respondent has the mandate to employ and create offices within the county public service hence has the statutory mandate to comply with the judgment. I order the 1<sup>st</sup> respondent, to within 14 days of today to issue notice of date and venue where the said 463 workers will present themselves to the 1<sup>st</sup> respondent with original ID cards as per list filed in the petition and their last letter of employment as a casual worker.
  - b. The employee will disclose to the 1<sup>st</sup> respondent in writing the last station of work with the county and the immediate supervisor for verification purpose. The 1<sup>st</sup> respondent will issue the notice in writing to the Petitioner and Moses Maelo Muyundi and as



well as post the said notice stating these requirements at prominent places within its premises within 14 days of today.

- c. Any worker of the 463 who fail to avail themselves as per the notice without sufficient reason will be considered as not having been a worker. The 1<sup>st</sup> respondent to file in Court the register of attendance of the said persons.
      - d. The 1<sup>st</sup> respondent to file in Court a report on compliance with these directions and of the judgment.”
4. The respondents filed their report in Court on the said exercise on the 30<sup>th</sup> October 2023.
5. The Applicant being discontented with the filed report, citing non-compliance with Judgment and the interdict/ procedural orders, filed the instant application dated 23<sup>rd</sup> January 2024 seeking the following orders: -
  - i. Spent
  - ii. That the Respondents’ report forwarded to this Court vide letter dated 27/10/2023 be expunged from the Court record.
  - iii. That upon grant of prayer (ii) the Respondents’ be ordered to fully comply with the decree of this Court given on 13/5/2020
  - iv. That in the alternative the deponents of the affidavits sworn on 27/10/2023 by (Amos Makokha) affidavit sworn on 16/ 10/2023 by (Paul Simiyu Mumelo) affidavit sworn on 16/ 10/2023 by (Josephat Masila Ayonga) affidavit sworn on 16/ 10/2023 by (Dominic Obunga Mitimbo) affidavit sworn on 16/ 10/2023 by Mildred Khasiala Induli) be ordered to appear in this Court and be cross-examined on the contents of their said affidavits respectively.
6. The application was premised on the grounds that the application did not comply with the orders given by the Court on the 28<sup>th</sup> July 2024 , that the respondents through coercion and undue influence have caused the above named deponents to swear false affidavits , that the respondents were keen to ensure that the casual workers do not get justice , the respondents did not permit the applicant to participate in the scrutiny on the suitability of the casual workers and that justice demands that due process should be followed in administration of justice.
7. The application was further supported by the affidavit of Moses Maelo Muyundi dated 23<sup>rd</sup> January 2023 where inter alia, he annexed copy of the advertisement notice (MMM3) which he says was to be done by the 1<sup>st</sup> Respondent but on contrary was issued by the Bungoma County Government. That though the respondents stated in their report none of the workers was qualified some of the workers were already employed on permanent basis following the petition, that some of the workers were obstructed from presenting documents out of time though had genuine reasons for the delay, (MMM4 was a letter dated 11<sup>th</sup> September 2023 by Dickson Barasa Jesome alleging to have been locked out on material date on basis of being late) , and MMM5 was letters of appointment of 3 of the officers also listed not to have been verified. That the deponents summoned for cross-examination had previously signed letters of employment for the workers of which they denied (MMM6 a-e). MMM7 was the list of the 463 workers.
8. The interested party filed a response to the application in opposition to the same.
9. The substantive response to the application was vide replying affidavit of Amos Simiyu Makokha sworn on the 12<sup>th</sup> March 2024 defending the report to the extend that it was in compliance with



the Court order and that only 286 persons appeared for the exercise. He denied any coercion on the deponents who disowned their affidavits.

10. In the meantime, the legal representations of the petitioner had changed from J.O. Makali & Company Advocates to James Oketch & Company advocates instructed by the General Secretary of the union.
11. On the 10<sup>th</sup> July 2024 on request of the Applicant, the deponents of the affidavits appeared for cross-examination as relates to the report filed by the respondents and their affidavits.
12. The first to take oath was Amos Simiyu Makokha who was also the advocate representing the respondents and stated to be the Legal Adviser and the v acting Bungoma County Attorney. He swore the replying affidavit in response to the instant application. He was cross-examined by the Applicant and Mr. Oketch Advocate. In addition, the 1<sup>st</sup> Respondent's Secretary, Joseph Makata; the Chairman of the 1<sup>st</sup> Respondent, Jonathan Nyongesa; and Paul Mumelo who told the Court he was Human Resources Officer in the Health department of Bungoma County, were cross-examined on the filed report by the Applicant and counsel for the Petitioner. They all supported the report and their affidavits.
13. The Petitioner and the Respondents further filed written submissions in the application. The Petitioner took same position as the Applicant who did not file separate submissions. The respondents' written submissions dated 14<sup>th</sup> September 2024 were filed by Makokha Wattanga & Luyali Associates Advocates. The Petitioner's written submissions (in support of the Application) dated 5<sup>th</sup> August 2024 were filed by James Oketch & Company Advocates. The Court perused the said submissions and had them in consideration in its decision.

## **Decision**

### **Whether the application was merited.**

14. To answer the question of whether the application was merited the Court finds it has to restate its decision in the ruling of 28<sup>th</sup> July 2024 and the procedural orders, establish whether the 1<sup>st</sup> respondent complied with the procedural order and whether the report filed by the Respondents was in compliance.
15. The Court in its ruling of 28<sup>th</sup> July 2023 in paragraph 80, observed: - 'In the upshot, though I may have held a different opinion or take different approach on the petition sitting as trial judge, I am now wearing cap of review of judgment of concurrent judge. I have no authority to overrule the judge. The parties have remedy of appeal for another opinion. I decline the prayer for review of the judgment of Justice Nduma, a concurrent judge dated 13<sup>th</sup> May 2020 for reasons of the application being on points of law, and on extraneous issues which require exercise of appellate jurisdiction and for lack of new evidence as required under the law.' The Court in essence upheld the entire judgment.
16. The Court further issued procedural order in public interest to enforce the judgment as follows:- 'Any further sufficient reason in public interest 81. I have considered the acrimony of the deponent Moses Maelo Muyundi and the petitioner. In order to protect interest of the workers under the judgment and further to clarify on the implementation of placement on payroll and payment of the said wages. I do exercise my judicial discretion and order the respondents jointly and severally to comply with the decision of the Court as per judgment of Justice Nduma of 13<sup>th</sup> may 2020 and file a report within 60 days on the compliance and for avoidance of doubt the list of 463 persons as per the following directions:-



- a. The 1<sup>st</sup> respondent has the mandate to employ and create offices within the county public service hence has the statutory mandate to comply with the judgment. I order the 1<sup>st</sup> respondent, to within 14 days of today to issue notice of date and venue where the said 463 workers will present themselves to the 1<sup>st</sup> respondent with original ID cards as per list filed in the petition and their last letter of employment as a casual worker.
  - b. The employee will disclose to the 1<sup>st</sup> respondent in writing the last station of work with the county and the immediate supervisor for verification purpose. The 1<sup>st</sup> respondent will issue the notice in writing to the Petitioner and Moses Maelo Muyundi and as well as post the said notice stating these requirements at prominent places within its premises within 14 days of today.
  - c. Any worker of the 463 who fail to avail themselves as per the notice without sufficient reason will be considered as not having been a worker. The 1<sup>st</sup> respondent to file in Court the register of attendance of the said persons.
  - d. The 1<sup>st</sup> respondent to file in Court a report on compliance with these directions and of the judgment.”
17. The Respondents filed a report in Court on the 30<sup>th</sup> October 2023 stating it to be in compliance with the above Court Order and signed by the members of the 1<sup>st</sup> Respondent on the 19<sup>th</sup> October 2023. The applicant seeks to have the report expunged from the Court record for reason of non-compliance with the Court orders as outlined above.
  18. The Court heard the parties and considered their submissions.
  19. The Court finds that the notice of the exercise pursuant to the Court Order was to be done by the 1<sup>st</sup> Respondent and not the 2<sup>nd</sup> Respondent though it was stated to have been done jointly.
  20. The Court holds that the content of the notice by the County Government of Bungoma did not comply with the procedural order of the Court for the following reasons:-
    1. The Notice introduced conditions outside the Court Order namely- “original and certified copy of the first and last letter of employment as a casual worker of the defunct local authority. “ The Court finds that this condition was contrary to the Court direction being: - ‘the said 463 workers will present themselves to the 1<sup>st</sup> respondent with original ID cards as per list filed in the petition and their last letter of employment as a casual worker.’”
  21. The Court further finds that the notice introduced other conditions not in the Court Order namely:-
 

‘Original and certified copy of birth certificate, certified copy of KRA pin certificate, original and certified copies of academic and professional certificates and original and certified copy of deployment letter.’”
  22. The Court holds that the exercise it ordered was tainted by the introduction of new conditions outside its Order. The Court agreed with the Applicant that it had declined the application for review of the judgment as stated in paragraph 80 of its ruling of 28<sup>th</sup> July 2023 and that the procedural orders were meant to assist in the enforcement of the judgment of 13<sup>th</sup> May 2020 and not to impede it in any way.
  23. On the process followed by the Respondents in arriving at the filed report, the evidence of the Secretary of the 1<sup>st</sup> Respondent was to effect that none of the 463 workers qualified for placement on the payroll of the Respondents for the reasons that 54 workers were underage as at 2012, 177 had produced letters signed by Paul Mumelo who denied the signatures stating they were forgeries and other letters were



also denied by the authors and 104 had no letters of the defunct local authorities and that the rest never appeared for the exercise.

24. The Court finds that the reference to letters of defunct local authority was not sanctioned by Court. The judgment had already made a finding that the 463 were casual workers under paragraph 23 and 24, that the workers had served the Respondents on casual basis before 2019. Indeed the Court in paragraph 23 of the judgment relied on some of the appointment letters by the said Paul Mumelo. Consequently, the judgment having not been reviewed the question of any worker lacking employment letter by the defunct local authority or deployment letters cannot be re-opened save in appeal. The issue of forgery of the letters by the defunct local authority authored by Mumelo or any other person could also not be reopened having been relied on by the Learned Judge in arriving at the judgment. On the issue of some workers being underage as at 2012, the Court finds that this was not an issue for the respondents to consider as the judgment was not reviewed. The Court will say no more on the same save to note there was evidence that one Dennis Maelo alleged to have been 4 years as at 2012 was indeed 26 years old then further poking holes on the credibility of the said verification process.
25. The Court order was specific and it was not open to the 1<sup>st</sup> respondent or the 2<sup>nd</sup> respondent to introduce own conditions.
26. On the issue of alleged forgeries, Mumelo appeared before Court and he could not point to any specific letter of forgery, he admitted to have known some of the workers before, to have signed letters for the clerk and most important the issue of forgery is a criminal issue and there was no evidence of report to the police for investigation.
27. The Court finds that the respondents did not act in good faith in the exercise directed by the Court to assist in compliance with the judgment. The entire exercise by the respondents leading to the filed report appeared to the Court, to have been geared towards defeating the judgment of the Court.
28. Consequently the report dated 19<sup>th</sup> October 2023 filed by the respondents is expunged from the Court record for non-compliance with the Court Order of 28<sup>th</sup> July 2023.
29. The evidence before Court was to effect that some of the workers had since been placed on payroll of the Respondents. The act of partial compliance with the judgment is discriminatory against the workers left out in breach of Article 27 of *the Constitution*. The continued non-compliance with the judgment further erodes the workers' right to dignity under Article 28 of *the Constitution*. This Court cannot condone violation of the workers constitutional rights by any person. The Court in so finding is guided by the definition of the term discrimination under the Black Law Dictionary to wit:- "The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." All the 463 casual workers have equal rights to benefit from the said Judgment.
30. In the upshot the application dated 23<sup>rd</sup> January 2024 is held to be merited and is allowed as follows:-
  - a. The report of the Respondents signed by the 1<sup>st</sup> Respondent members on the 19<sup>th</sup> October 2023 and forwarded to this Court vide letter dated 27<sup>th</sup> October 2023 by Makokha Wattanga & Luyali Associates a Advocates is expunged from the Court record for non-compliance with Court directions and for other reasons stated in the decision.
  - b. The Respondents are ordered to fully comply with the Decree of the Court given on the 13<sup>th</sup> May 2020.



31. The Court makes no order as to costs.

32. It is so Ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**J.W. Keli**

**JUDGE**

In The Presence Of

C/A Brenda

The Applicant- In person

For Petitioner- Oketch Advocate

For Respondents – Walaka h/b Makokha

Later

Ms. Walaka

I pray for stay of 60 days.

Court Order

The other parties having left the court cannot issue the order. The Respondent at liberty to make a formal application.

**25/09/2024**

