

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISII

MISCELLANEOUS NO. E001 OF 2024

(Before Hon. Justice Dr. Jacob Gakeri)

EVANS MORARA NYANGONGO.....

APPLICANT

VERSUS

**JOHN OTIENO AKOLA, THE PRINCIPAL KISII
NATIONAL POLYTECHNIC.....1ST**

CONTEMNOR

**EVERLYN MITEI, CEO/SECRETARY TEACHERS
SERVICE COMMISSION.....2ND**

CONTEMNOR

**DR. ESTHER MUORIA, PS STATE DEPARTMENT OF
VOCATIONAL & TECHNICAL TRAINING....3RD**

CONTEMNOR

RULING

Before the court for determination is the applicant's Amended Notice of Motion dated 17th July 2025 seeking Orders that:-

1. Spent.

2. The Honourable Court be pleased to cite the contemnors for contempt in ELRC Petition No. E007

*of 2022 **Evans Morara Nyangongo & another V Cabinet Secretary Ministry of Education & 8 others** dated 18th April 2024.*

- 3. The Honourable Court be pleased to commit the contemnors to civil jail for a term of 6 months and or until the respondents purge the contempt by reinstating the applicants to their former duties and responsibilities and reinstating his salary in the TSC payroll.*
- 4. The respondents be fined not less than Kshs.200,000 for such contempt.*

The Notice of Motion is expressed under Article 165(6) and (7) of the Constitution of Kenya, Section 5 of the Judicature Act and Rule 81.4 of the English Civil Procedure (Amendment No.3 of 2020 and is based on the grounds outlined on its face and the Further Affidavit sworn by the applicant on 17th July 2025.

The applicant deposes that the 1st respondent was an agent of the 2nd respondent and wilfully refused to reinstate the applicant at the Kisii Polytechnic as the Head of Agriculture Department and Co-ordinator of SIFA Projects and the 2nd respondent refusal to reinstate the applicant on the TSC payroll.

That the orders made by Abuodha J in 2018 were still active for obedience.

The affiant deposes that he was deployed to a TVET institution as a Vocational and Technical Trainer and all respondents had been served with the Orders on 22nd May 2024.

The affiant admitted that the transfer of 3780 teachers to the Ministry of Education State Department of Vocational and Technical was quashed and the 2nd respondent's letters dated 28th August 2024 revealed a conspiracy between the 2nd and 3rd respondents to manipulate execution.

That the court Orders required reinstatement of the applicant to Kisii Polytechnic and reinstatement of salary and the respondents had not complied with the Orders.

1st Respondents response

The affiant deposed that he was the Principal of Kisii Polytechnic.

That the applicant was transferred to the Polytechnic effective 1st July 2018 as all trainers in all technical

institutions and Polytechnic were transferred to the PSC and the applicant petitioned to transfer to Bureti TTC that he was not an employee of the PSC and the Judgment of Abuodha J returned the applicant to the TSC and he could not reinstate staff as he had no mandate to do so.

3rd Respondent's response

By a Replying Affidavit sworn by Dr. Esther Mworio on 25th July 2025, the affiant deposed that she was aware of the transfer teachers from the Teachers Service Commission to the Public Service Commission (PSC) effective 1st July 2018 and the applicant was deployed at the Kisii National Polytechnic by the PSC.

That the judgment by Abuodha J declared the circulars unconstitutional and she wrote to the Teachers Service Commission on implementation of the judgment which advised the applicant to report to the Director of Staffing for posting to a public institution under the mandate of the TSC and notified the applicant that he would be transferred back to the TSC as he could not be reinstated to the Kisii National Polytechnic.

That the court Orders did not affect the State Department of TVET as the teachers reverted to the TSC, including the

applicant and reinstating the applicant to the Kisii National Polytechnic would be contrary to the judgment of Abuodha J. and TSC was complying with the Orders.

2nd Contemnors Preliminary Objection

The 2nd contemnor stated that the instant Notice of Motion was incompetent for want of a Supporting Affidavit and was thus in breach of Rule 47 of the Employment and Labour Relations Court (Procedure) Rules 2024 and Section 34 of the Civil Procedure Act that all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.

That the application was misconceived, incurably defective, bad in law, frivolous, vexatious and a gross abuse of court process.

By a Further Affidavit sworn on unidentified date, the applicant deponed that the respondents responses were filed by strangers and the Attorney General had no leave of the court to act for the respondents and a contempt

application was different from proceedings in the trial court.

That the Attorney General had no *locus standi* to address the court.

That the 1st respondent was retained in the PSC payroll irregularly and was one of the 102 TSC appointed Principals who was deployed at Magwego Technical Training by the TSC.

That the applicant had never transferred his service to the PSC and was deployed and transferred from Ekerubo Getai Technical Training Institute to Bureti Technical Training Institute on 28th April 2016 then to Kisii National Polytechnic and not by the PSC.

That the respondents had concealed material facts on the decrees by Abuodha J which quashed the transfer of 3780 teachers to the PSC payroll did not revert to the TSC.

Applicant's submissions

As to whether the respondents were guilty of disobeying court Orders, counsel submitted that the 1st contemnor

authored the letter transferring the applicant and all were aware of the court Orders.

That the applicant was transferred to the Kisii National Polytechnic by the TSC vide letter dated 13th May 2016 and the letter was not cancelled by the employer.

That the 1st contemnor refused to assign the applicant duties and clarification by the court was never sought.

That the 1st and 3rd respondents refusal to allow the applicant resume duty and it was not a fresh redeployment.

Reliance was placed on the decision in **Onyango V Speaker County Assembly of Migori & 3 others** [2025] KEELRC, **Samuel M. N. Mweru & others V National Land Commission** [2020] KLR on the elements of contempt as was the decision in **Republic V Attorney General & another Ex Parte Mike Maina Kamau** [2020] eKLR.

Counsel urged that the Orders made by the court were clear and unambiguous and salaries had to be reinstated

by the TSC and allow him resume duty at the Kisii National Polytechnic.

Counsel urged that the 1st and 3rd contemnors averments that the transfer was effected by the PSC was untrue as PSC was supposed to allow the applicant back to the Polytechnic.

That all the contemnors were aware of the decree.

Reliance was placed on the sentiments of the court in **Newton Kagira Mukuha V Charles Mukuha Gashore & 14 others** [2023] KECA 1482 (KLR), **Econet Wireless Kenya Ltd V Minister for Information & Communication Commission of Kenya**, [2005] eKLR and **Basil Criticos V Attorney General** on knowledge of the Order [2012] eKLR.

Counsel, further, submitted on the meaning of reinstatement as captured in **Kenya Power & Lighting Co. Ltd V Aggrey Lukorito Wasike** [2017] eKLR, to urge that the respondents refused to reinstate the applicant.

1st and 3rd respondent's submissions

On the elements of contempt, reliance was placed on the sentiments of the court in **Republic Attorney General Ex Pare Mike Maina Kamau** (supra).

Counsel urged that the Orders were not binding on the 1st and 2nd respondents. By Circulars Ref No. PSC/RM/41/XXXIV/38 dated 7th June 2018 and TSC/ADM/192A/VOL.IXI47 dated 27th July 2018 trainers were transferred to the PSC effective 1st July 2018 and the applicant was thus transferred to the Ministry of Education, State Department of Vocational and Technical Training and deployed to Kisii National Polytechnic by the PSC but the circulars were declared unconstitutional and trainers reverted to the TSC and acts done as a result of the circulars were null and void.

That the 1st contemnor was not bound by the Order as he neither recruited nor deployed employees.

By 13th November 2025 the TSC had not filed submissions.

Strangely, neither the claimant's counsel nor counsel for the 1st and 3rd respondents submitted on the 2nd

respondents Preliminary Objection on the competency of the instant notice of motion.

Analysis

Before delving into whether the respondents or any of them is guilty of disobeying court orders, it is necessary to dispose of the 2nd respondent's Preliminary Objection dated 28th July 2025 challenging the competency of the instant motion for non-compliance with Rule 47 of the Employment and Labour Relations Court (Procedure) Rules, 2024 among other others.

The applicant did not challenge the competency of the 2nd respondent's Preliminary Objection. Under the Rule in **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd** [1969] EA 696.

Rule 47 provides:

A notice of motion shall state in general terms the grounds of the application and where the motion is supported by an affidavit, both the notice of motion and a copy of the Affidavit shall be served on the other party.

It is common ground that the applicant's affidavit sworn on 17th July 2025 is supported by an affidavit styled as a

“Further Affidavit”. It is unclear to the court why it was styled as such as opposed to a Supporting Affidavit. A further affidavit presupposes the existence of another affidavit.

Be that as it may, the misdescription or misstatement of the title of the affidavit notwithstanding, the affidavit was filed in support of the instant Notice of Motion and the court is satisfied that it is admissible as an affidavit in support of the Notice of Motion.

More significantly, the misdescription of the Affidavit did not affect the contents and relatedly, it could easily be argued that that it was a procedural technicality which the court ought not to accord undue regard under Article 159(2)(d) of the Constitution of Kenya as it did not implicate the jurisdiction of the court.

See in this regard **Kensilver Express Ltd & 137 others V The Commissioner of Insurance & 3 others** Civil Appeal No. 39 of 2009 **Henry Njai V Taita Ranching Co. Ltd** Civil App. No. 255 of 2010, **Kamlesh Mansukhalal Damji Pattni V Director of Public Prosecutions & 3 others** [2015] KECA 690 (KLR).

In **Microsoft Corporation V Mitsumi Computer Garage Ltd & another** Ringera J. stated:

“Rules of procedure are the hand maidens and not mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviation from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not be treated as nullifying the legal instruments thus affected”.

These sentiments apply on all fours to the circumstances of the instant case.

As regards non-compliance with Section 34(1) of the Civil Procedure Act on determination of all questions arising between the parties to the suit by the court executing the decree as opposed to a separate suit, it is correct that ought to be the case.

However, the instant suit was filed in December 2024 and was referred to this court vide the ruling delivered on 19th June 2025 as proper service on the respondents had not been demonstrated.

In the court's view, although the provisions of Section 34(1) of the Civil procedure Act are couched in mandatory tone, the fact that the suit has progressed this far without objection would appear to suggest that counsels had no challenges proceeding as such.

No doubt, this provision serves a salutary purposes. It ensures that the court is appraised of the entire case unlike the instant case where none of the parties filed the judgment of Abuodha J which the respondents made reference to and related to the transfer of certain trainers from the TSC to the PSC which the court declared unconstitutional. The two circulars were important pieces of evidence even in this application but were not filed.

Be that as it may, the court is not persuaded that a case for striking out of the instant suit has been made out.

To this extent the 2nd respondent's Preliminary Objection is for dismissal and it is accordingly dismissed.

The pith and substance of the applicant's case is that the three (3) respondents are guilty of contempt and ought to be cited for contempt, sentenced to imprisonment and fired for the contempt.

The foundation of the applicant's case is the judgment of Baari J in Kisumu ELRC PET No. E007 of 2022 **Evans Morara Nyangongo & another V Cabinet Secretary Ministry of Education & 7 others.**

The Decree read as follows:

- 1. A declaration that transfer instituted by PSC against the Petitioners is illegal and unconstitutional.*
- 2. The Petitioners salaries be reinstated forthwith and they be allowed to report back to work immediately.*
- 3. Costs be borne by the respondents jointly and severally.*

According to the applicant the respondents were guilty of contempt as his salary had not been reinstated and the respondents had not "reinstated" him.

The 1st respondent averred that he had no power to deploy or transfer staff and was not bound by the Order.

Similarly, the PSC contended that since the trainers, including the applicant reverted to the TSC, it had done its part and the 3rd respondent attached letters dated 17th July 2024 and 24th October 2024 to the 2nd respondent and the applicant respectively releasing him to the Teachers Service Commission in accord with the Judgment of the court.

Evidently, the 3rd respondent showed keen interest in having the court's judgment implemented.

When the matter came up for hearing on 30th September 2025 all counsels were present. Mr. Mulaku for the 2nd respondent informed the court that the applicant had not been reinstated on the TSC payroll and had to be rerouted to another school because the first school had teachers in the subjects he was to teach and Mr. Masolo, counsel for the applicant was notified and reinstatement on the payroll would be effected in October 2025.

Mr. Masolo asked Mr. Mulaku to confirm whether the applicant had been reinstated as Head of Department and Mr. Mulaku agreed to seek instructions on the issue and a mention was slated for 27th October 2025 to confirm compliance but Mr. Mulaku was absent.

According to Mr. Masolo, part of the applicant's salary arrears had been paid.

Juma for the 1st and 3rd respondents indicated that her clients had nothing to comply with as the applicant was an employee of the TSC.

The court gave directions on filing and exchange of submissions and compliance by the 2nd respondent but had not complied by 13th November 2025 when the matter was mentioned for the last time.

The principles that govern contempt of court matters are well settled.

Section 5 of the Judicature Act provides:

(1) The High Court and the Court of Appeal shall have the same power to punish contempt of court as is for the time being possessed by the High Court of justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

(2) An Order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and

sentence made in exercise of the ordinary criminal jurisdiction of the High Court.

See in this regard **Justus Kariuki Mate & another V Hon. Martin Wambora & another**, Civil Appeal No. 24 of 2014 (**Wambora case**).

The necessity to punish persons who disobey court orders cannot be overemphasized. It ensures that the dignity and authority of the court is maintained and enhances the rule of law.

In **Refrigeration and Kitchen Utensils Ltd V Gulabchand Popatlal Shah & another**, Civil Application No. 39 of 1990 the Court of Appeal held;
"...It is essential for the maintenance of the rule of law and good Order that the authority and dignity of our courts is upheld at all times".

See **Hadkinson V Hadkinson** [1952] ALLER 567.

In **Shimmers Plaza Ltd V National Bank of Kenya Ltd** [2015] KECA 945 (KLR) the Court of Appeal stated;
We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be

allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:-

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”.

...The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy...”

As regards elements of contempt, in **Samuel M. N. Mweru & others V National Land Commission & 2 others (supra)** Mativo J (as he then was) stated:

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii) Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference

*by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand*, who succinctly stated:-*

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases) which is higher than civil cases) that:-

(d) the defendant's conduct was deliberate.

These sentiments were cited with approval by the Court of Appeal in **Wekesa & others V Munialo** [2025] KECA 679 (KLR).

I will now proceed to analyse the instant case in the context of the foregoing principles of law.

The first requirement is that there must be a court Order(s) that is clear and unambiguous directed at the respondent(s). In the instant case, the court Orders were exceedingly clear and lacked any ambiguity and none of the respondents raised any issue regarding their clarity.

Second all the respondents were aware of the Orders as they had been served by the applicant.

Indeed, by its ruling delivered on 19th June, 2025, the court directed the applicant to serve the 3rd Contemnor properly.

Third, as to whether the respondents acted in breach of the court Orders, parties have adopted opposing positions. While the applicant averred and submitted that all the respondents were in contempt and liable to being cited and punished, the respondents case was that attempts had been made to comply with the Orders.

The most contentious issue is reinstatement of the Petitioners salary and reporting back to work.

The court directed that:

- (i) *The Petitioners salaries be reinstated; and*
- (ii) *The Petitioners be allowed to report back to work immediately.*

On reinstatement of salaries, Mr. Mulaku, counsel for the 2nd respondent notified the court that the Petitioners would be reinstated on the payroll of the TSC in October 2025 but was not in court on 27th October 2025 and 13th November 2025 to confirm the position. However, on 27th October 2025 Mr. Masolo indicated that he had been told that some monies had been paid to the Petitioners, which could only happen if they had been reinstated in the 2nd respondent's payroll.

The process of reinstatement of the Petitioners into the payroll has taken long owing to administrative process after having been transferred to the Public Service Commission, following the transfer of teachers to the State Department of Technical and Vocational Education and Training in accord with the provisions of the Technical and Vocational Education and Training Act, which hived off Technical and Vocational Education Training, Administration, Management and Oversight from mainstream education and training and placed it

under the Technical and Vocational Education Training Authority (TVETA) under the State Department of Technical, Vocational Education and Training, which culminated in the Circulars PSC/HRM/41/XXXIV/38 dated 7th June 2018 and TSC/ADM/192A/VOL.IX/47 dated 27th July 2018, which the court declared unconstitutional.

Under the Act, the TSC has no mandate or role over any public institution offering technical or vocational education or training, be it a Vocational Training Centre, Technical and Vocational College, Technical Trainer College or National Polytechnic, since they fall under the ambit of the TVETA.

In sum, it is clear that the respondents did not implement the court Order with immediacy with which the Orders ought to have been acted upon, and were thus to some extent in breach of the court Orders.

Be that as it may, passage of time notwithstanding, evidence on record revealed that efforts were expended in an attempt to comply with the court Orders.

For instance, vide letter dated 17th July 2024, the Principal Secretary State Department Technical, Vocational

Education and Training Dr. Esther Mworira paraphrased the Court Orders to the Secretary TSC Dr. Nancy Macharia on the implementation of the decision.

Similarly, by a letter dated 24th October 2024 the PS informed the applicant that he had been released back to the TSC in compliance with the Court Order and would to be paid his salary and arrears up to October 2024, and was to handover the institutes property.

On its part, by letter dated 28th August 2024, the TSC, notified the applicant to report to the Director of Staffing for posting to a public institution under the Commission's mandate.

Contrary to the applicant's submissions, the court did not Order reinstatement of the applicant. The Judge stated: *"That the Petitioners salaries be reinstated forthwith and they be allowed to report back to work with immediate effect"*.

Evidently, the term reinstatement does not feature anywhere for obvious reasons. The Petitioners were still in employment and had not been dismissed or terminated from employment for the provisions of Section 49 of the

Employment Act to be invoked, and appreciating that fact, the court directed that they be allowed to go back to work. The court was, however not unequivocal that reporting back to work had to be to the same place or institution, which would explain the 2nd respondent's attempts to place the Petitioner in a public institution under its mandate and National Polytechnics were not.

The 2nd respondent, in the court's view cannot be faulted for construing the court Orders in the manner it did.

In the court's considered view, reporting to the Director of Staffing at the TSC officer for deployment or redeployment would still amount to reporting back to work, the previous posting to Technical institutions notwithstanding.

A panoramic view of the actions taken by the 2nd and 3rd respondents show that there was no deliberate, intentional or blatant disregard of the court Orders dated 18th April 2024.

As explained by the Court of Appeal and other courts in **Wekesa & 2 otehrs V Munialo** (supra) and Mativo J in **Samuel M. N. Mweru & others V National Land**

Commission (supra), one of the core elements of civil contempt is that the defendant or respondents conduct must be deliberate or intentional or wilful. The conduct must be defiant, which in the court's view has not been demonstrated in this case to the required standard of proof as enunciated in **Mutitika V Baharini Farm Ltd** [1985] KECA 60 (KLR) thus:-

"...In our view, the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi-criminal in nature. Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved

"with such strictness of proof ... as consistent with the gravity of the charge..."

...Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt we hold that it has not been shown that the respondents intended..."

These sentiments apply with equal force to the circumstances of the instant case.

In conclusion, having failed to evidentiary demonstrate that the respondents acted deliberately, intentionally or wilfully in disregarding the court Orders, it is the finding of the court that the applicant has failed to prove civil contempt against the respondents.

The upshot of the foregoing is that the applicant's Amended Notice of Motion 17th July 2025 is devoid of merit and it is accordingly dismissed.

Parties shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 1ST DAY OF DECEMBER 2025.**

**DR. JACOB GAKERI
JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on

15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE