



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Arero v Munubi & 4 others (Civil Appeal 196 of 2020)
[2022] KECA 58 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 58 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 196 OF 2020
DK MUSINGA, W KARANJA & PO KIAGE, JJA
FEBRUARY 4, 2022**

BETWEEN

KABALE TACHE ARERO APPELLANT

AND

DR. SALOME MUNUBI 1ST RESPONDENT

DR, FABIAN LUKALO 2ND RESPONDENT

FRANCIS MUGO 3RD RESPONDENT

LEONARD OMULLO 4TH RESPONDENT

PROF. MUHAMMAD SWAZURI 5TH RESPONDENT

(An appeal from the Ruling and Order of the Employment and Labour Relations Court at Nairobi (M. Onyango, J.) delivered on 7th October 2019 in E.L.R.C. Petition No. 8 of 2019.)

JUDGMENT

1. The 1st, 2nd, 3rd and 4th respondents were directors of the National Land Commission (NLC). In a petition and a suit filed sometime in 2019 before the Employment and Labour Relations Court (M. Onyango, J.), the respondents challenged the variation of their terms of employment, from contractual engagement to permanent and pensionable, then a reversal to contractual terms. They sought, inter alia, declarations that: they are and remain permanent and pensionable employees of the NLC; and that the change of their terms of employment constitutes an unfair labour practice, is unlawful and illegal.



2. Although the petition was dismissed vide a judgment delivered on 24th May 2019, the trial court made the following order:

“I therefore will order and do hereby order, that the contracts of all the petitioners be renewed according to the resolution of the Commission at its meeting of 8th May 2018, and the subsequent special meeting of the Commission held on 13th December 2018 so that they do not become victims of the infighting among the Commissioners of the NLC.”

3. As at the date of delivery of the said judgment, the term of the Commissioners of the NLC had come to an end on 19th February 2019. The new Commissioners assumed office on 15th November 2019. However, the appellant, who was the secretary to the NLC and the Acting Chief Executive Officer, and was running basically all the operations of the NLC during the absence of the Commissioners, was in office and the petitioners contended that she had power and authority to implement the order that had been issued but she refused and/or failed to do so.

4. In the absence of any appeal against the said judgment, the respondents filed an application seeking committal to civil jail of the appellant for six months for contempt of court for failing to implement the trial court’s judgment. The appellant had been served with the decree but she vowed not to implement it, and even denied the respondents access to their offices and stopped payment of their salaries, the respondents argued.

5. Upon service of the contempt application, the appellant filed a preliminary objection to the application stating, inter alia, that she was not served with the judgment and decree issued by the trial court and that there were no directions regarding implementation of the impugned court order in the absence of the Commissioners.

6. In a ruling delivered on 7th October 2019, the trial court established that the appellant was not only aware of the judgment and decree but was also served with it and had power and authority to implement it. The court therefore found that the appellant had acted in contempt of its orders and fined her Kshs.300,000, and in default one month’s imprisonment.

7. Being aggrieved by the said conviction and sentence, the appellant filed an appeal raising 8 grounds of appeal, which may be consolidated into the following three grounds:

- a. That the learned judge erred in holding the appellant in contempt of court when she had no authority to implement the judgment and decree;
- b. That the learned judge erred in law in considering extraneous factors in citing and punishing the appellant for contempt;
- c. That the appellant was not afforded a fair hearing.

8. The respondents also filed a cross-appeal and raised two grounds:

- “1. That the learned judge erred in Law by failing to take into consideration that the Contemnor had disobeyed the orders of Court from the onset by stopping the Respondents’ salaries and locking their office doors in April 2019 even when interim orders were subsisting.
2. That despite the appellant’s contention that only the NLC Commissioners could implement the Court judgment and decree delivered on 24th May 2019



and NLC Commissioners assuming office on 15th November 2019, the said judgment and orders remain unimplemented.”

9. The appellant urged the Court to order that: -
- “ 1. This Cross-Appeal be allowed;
 2. The Ruling of Court delivered on 7th October be reviewed and the Appellant be cited and punished for Contempt of Orders of Court and be committed to civil jail for a period of 6 months;
 3. The Appellant be declared unfit to hold public office for failure to obey Court Orders specifically the Judgment and Order of Court delivered on 24th May 2019;
 4. The National Land Commissioners: Gershom Otachi Bw’omanwa, Kazungu Kambi, Reginald Okumu, Alistar Murimi Mutugi, James Tuitok and Getrude Nduku Nduku be cited and punished for contempt of Court for continued disobedience of the Judgment and Decree of Court issued on 24th May 2020.”
10. The appeal was disposed of by way of written submissions that were briefly highlighted by counsel. Mr. Masese appeared for the appellant, Mr. Malenya appeared for the 1st to 4th respondents, and Mr. Okubasu for the 5th respondent.
11. Mr. Masese submitted that the appellant was an acting CEO and therefore had no power or authority to implement the trial court’s judgment. Only the full NLC or a substantive CEO could implement the judgment, counsel contended. Secondly, the appellant’s counsel submitted that the appellant was not given an opportunity to explain herself before the committal order was made. He stated that after the filing of the contempt application the appellant filed a preliminary objection challenging the propriety of the application. Upon dismissal of the preliminary objection the appellant was not given an opportunity to file a replying affidavit, instead the court proceeded to dispose of the application.
12. In response, both Mr. Malenya and Mr. Okubasu submitted that during the 10 months’ duration of absence of Commissioners, the appellant, being the acting CEO, discharged all the functions of the Commissioners.
13. Mr. Malenya submitted that section 2 of the [Public Service Commission Act](#) defines “acting appointment” as a
- “temporary conferment upon a public officer, by the Commission or the relevant appointing authority, the power to perform duties of a public office other than the office the officer is substantively appointed to hold, while the public officer continues to hold the substantive appointment.”
14. Counsel also cited section 34 of the [Public Service Commission Act](#) which states as follows:
- “ 34. (1) Acting appointments shall be –
- a. made by the lawful appointing authority; and



- b. subject to the prescribed regulations and procedures which apply to appointments.

(2) A person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding the public office.

(3) An officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months.

(4) A public officer may be assigned to perform duties vested in another public officer during a temporary absence of the other public officer.

(5) An acting appointment under subsection (4) shall-

- a. be in favour of a public officer who is duly qualified and competent to perform the duty; and
- b. not undermine the expeditious appointment or deployment of a competent person to the public office concerned.

(6) The Commission shall, whenever it comes to its attention that an authorised officer has purportedly made an acting appointment or assignment, in contravention of the provisions of this section, take corrective action.”

15. The respondents urged us to dismiss the appeal in its entirety and allow the cross-appeal. We shall begin by considering whether the appellant was served with the impugned judgment/decree or was aware of it. The trial court established that the decree was extracted and served upon one Habiba, the appellant’s secretary, who the appellant had authorized to accept service on her behalf; and that the appellant had stated in her replying affidavit that she had been informed by the advocates for NLC about the judgment and the decree. The appellant was therefore properly served with the decree and was well aware of its contents.
16. Did the appellant have authority to implement the decree? We agree with the learned judge that section 43 of the *Interpretation and General Provisions Act* that where a written law confers a power or imposes a duty on the holder of an office, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.
17. By virtue of Article 250 (12) of the *Constitution of Kenya, 2010*, and section 20(4) of the *National Land Commission Act*, the secretary is the CEO and accounting officer of the Commission. The appellant therefore had the power and authority to implement the decree. But instead of doing so, she instead denied the 2nd and 4th respondents’ access to their offices and stopped their salaries, among other contemptuous acts. The appellant was entirely calling the shots at the NLC in the absence of the Commissioners. She chose to act in open and deliberate contempt of court.
18. As held by the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* [2019] eKLR: Considering the conduct of the appellant, we affirm the trial court’s finding that the appellant was in contempt of court.
19. Upon delivery of the trial court’s ruling on 7th October 2019, the matter was rescheduled to 11th October 2019 for mitigation and sentencing. The appellant was required to attend court but she did not. Her advocate said that he could not reach her, although she had filed an application for stay of further proceedings pending hearing of an application that she had filed before this Court. The court adjourned sentencing to the afternoon and further directed that the appellant be produced in court.



Come that afternoon, the appellant again refused and/or failed to honour the court's directions. The trial court had no option but to proceed to sentence the appellant in her absence.

20. In the circumstances, we are satisfied that the conviction and sentence passed by the trial court were well founded in law. Consequently, we dismiss the appeal in its entirety.
21. Turning to the cross-appeal, the respondents urged this Court to find that the learned judge erred in law by failing to take into consideration that the appellant had disobeyed the orders of the trial court from the onset by stopping their salaries and locking their office doors in April 2019 even when interim orders were subsisting.
22. Our perusal of the record and the ruling shows that the learned judge was well aware of the appellant's conduct. That ground has no merit and we dismiss it.
23. On the second ground of the cross-appeal, the respondents argue that despite NLC Commissioners assuming office on 15th November 2019, they have failed to implement the said judgment and orders, and have asked us to cite the Commissioners for contempt and punish them accordingly. Alternatively, we were urged to award the respondents damages for the five (5) years period of their contracts amounting to Kshs.31,200,000 for each of the respondents at Kshs.520,000 per month.
24. During the hearing of the appeal, the Court was told that the positions that were held by the 1st to 4th respondents are still vacant, but the 1st and 3rd respondents have been on suspension, following charges of corruption that were preferred against them, in line with the provisions of section 62 of the *Anti-Corruption and Economic Crimes Act*. The relevant part of the section states as follows: -

“64. Disqualification if convicted of corruption or economic crime

1. A person who is convicted of corruption or economic crime shall be disqualified from being elected or appointed as a public officer for ten years after the conviction.
2. This section does not apply with respect to an elected office if the Constitution sets out the qualifications for the office.
3. This section does not apply with respect to a conviction that occurred before this Act came into operation.
4. At least once a year the Commission shall cause the names of all persons disqualified under this section to be published in the Gazette.”

25. The trial court ordered that the respondents' contract be renewed as had been resolved by the Commission on 8th May 2018, although that was not done. However, in *Kabale Tache Arero v Salome Munubi & 3 others* [2020] eKLR, this Court stayed proceedings in ELRC Petition No. 8 of 2019 (which gave rise to this appeal), and execution of any further orders as issued by the trial court. That being the case, this Court cannot make any finding in this appeal. on the issue of alleged contempt against the Commissioners, who we also note are not parties to these proceedings and we were not even told whether they were served with the application. We further note that the appellant has also filed another appeal, Civil Appeal No. 248 of 2020 against the entire judgment in ELRC Petition No. 8 of 2019.
26. Besides, the 1st and 3rd respondents were lawfully suspended following their arraignment in court on charges of corruption. We were not told why they have not been getting half of their monthly



salaries as required under section 62 (1) of the *Anti-Corruption and Economic Crimes Act*. However, under section 62 (4) of the Act, there are circumstances under which a public officer may be suspended without any pay. We think the second ground of cross-appeal ought to have been raised in Civil Appeal No. 248 of 2020 as this appeal only challenges the appellant's conviction for contempt of court.

27. All in all, we find no merit in the cross-appeal and dismiss it in its entirety. Consequently, the appeal and the cross-appeal are both dismissed. Each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

