



Taita Taveta County Government & another v Mwakungu & 12 others (Civil Application 108 of 2019) [2022] KECA 1125 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1125 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 108 OF 2019
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA
OCTOBER 21, 2022**

BETWEEN

TAITA TAVETA COUNTY GOVERNMENT 1ST APPELLANT

TAITA TAVETA PUBLIC SERVICE BOARD 2ND APPELLANT

AND

JACOB MWAKUNGU & 12 OTHERS RESPONDENT

(Being an appeal against the ruling and order of the Employment and Labour Relations Court at Mombasa (Rika, J.) delivered on 21st March, 2019 in Mombasa ERLC Cause No. 11 of 2019)

RULING

1. By a Notice of Motion dated 2nd December 2019 brought pursuant to sections 5 and 28 of the [Contempt of Court Act](#), Section 1a, 1b, 3, 3a and 63 of the [Civil Procedure Act](#), order 40, order 15 rule 1 of the [Civil Procedure rules](#) 2010, the applicants, Jacob Mwakungu and 12 others seek orders that;
 - a. This Court find the respondents herein Taita Taveta County Government and Taita Taveta Public Service Board the 1st and 2nd appellant/respondents in contempt of the Consent Order of 6th May 2019.
 - b. This Court be pleased to commit the said respondents herein for a period not exceeding six months or any such period as may be directed by the honourable Court for disobeying the Consent Order of 6th May 2019.
 - c. That this Court be pleased to issue such other or further punitive orders on respect of the said contempt as may be necessary for the ends of justice to be met.
 - d. That costs be in the cause.



2. The applicants' Motion is brought on the grounds set out on its face and is supported by the affidavit of Christine Mwikali Kipsang, learned counsel on record for the applicants/respondents, sworn on 2nd December 2019 and in written submissions. It was asserted that the applicants were recruited by the 2nd respondent/appellant on 20th February 2014 as Ward Administrators and issued appointment letters by the 1st respondent/appellant; that on 7th February 2019, they were unprocedurally dismissed from work. Aggrieved by the decision to terminate their employment, the applicants filed a Memorandum of Claim dated 7th March 2019 in ELRC No. 11 of 2019 - Jacob Mwakungu & 12 Others vs Taita Taveta County Government & Taita Taveta Public Service Board, wherein the trial court issued orders on 8th March 2019 barring the respondents/appellants or their agents, servants or employees from advertising, interviewing, selecting recruiting, employing or absorbing new Administrators to replace the applicants; on 21st March 2019 the respondents/appellants filed a Notice of Preliminary Objection objecting to the jurisdiction of the trial court citing rule 5 of the Public Service Commission (County Government Public Service Appeals Procedure) Rules 2016; that the court dismissed the Preliminary Objection on jurisdiction and ordered the parties to pursue the claim at Public Service Commission, but extended the orders against advertising or recruitment of other administrators. The matter was fixed for mention on 21st June 2019.
3. The respondent/appellants were aggrieved by the order, and lodged an appeal being Civil Appeal Number 38 of 2019. In the meantime, they sought for orders of stay of execution and stay of proceedings against ruling of the ELRC vide a Notice of Motion dated 26th March 2019; that the motion was set for hearing on 6th May 2019; that at the hearing, the parties entered into a consent allowing the orders of stay, pending the hearing and determination of the appeal before the Public Service Commission. It was contended that the applicants have continued to pursue their appeal at the Public Service Commission and that a decision is still pending.
4. The applicants complaint is that despite the existent court order, the appeal pending before this Court, the proceedings in the ELRC and at the Public Service Commission, the respondents have gone ahead to advertise the applicants' positions in The People Daily newspaper on 27th November 2019 on page 12 and on the 1st respondent's website <http://taitataveta.go.ke/vacancies> and was aimed at disrespecting the trial court and denying the applicants a chance to be heard.
5. The application was opposed by a replying affidavit of Edwin Chahilu Ayiro, the Director of Legal Services and acting County Attorney of the 1st respondent/appellant sworn on 23rd June 2020. It was deponed that the application was fatally defective, ill-conceived, an abuse of court process and should be dismissed in limine with costs to the respondents; that the contempt of court orders sought against the respondents have no basis as the application is premised on provisions of the law that are not applicable to this Court; that the Contempt of Court Act relied upon has been declared null and void by Mwita J. in Kenya Human Rights Commission vs Attorney General & another [2018] eKLR; that this Court has no jurisdiction to hear and determine this application as the orders alleged to have been disobeyed, were issued by the trial court and not this Court, and therefore the application is not properly before this Court; and that the court orders sought cannot issue against corporate entities such as the respondents.
6. Further, that the orders alleged to have been disobeyed were stayed by consent of the parties in Civil Application No. 18 of 2019 on 6th May 2019 pending hearing and determination of the substantive appeal; that as a result, the ELRC orders of 21st March, 2019 which barred the respondents from advertising, interviewing, selecting; recruiting, employing or absorbing new administrators to replace the applicants were stayed; and that this paved way for the respondents to advertise, interview and



recruit new administrators. Lastly, that the appeal before the Public Service Commission was heard and determined in the respondents' favour.

7. We have considered the pleadings, the parties' submissions, the authorities and the law. What the applicants are seeking is for this Court to issue contempt of court orders against the respondents/appellants for their failure to adhere to the trial court orders of 8th March 2019 barring the respondents/appellants or their agents, servants or employees from advertising, interviewing, selecting, recruiting, employing or absorbing new administrators to replace the applicants.

8. After considering the application and the nature of the orders sought, we find that they are incapable of being granted. This is for the reasons that;

the applicants seek the following orders;

"... this Honourable Court be pleased;

- a. to find the respondents herein Taita Taveta County Government and Taita Taveta Public Service Board the 1st and 2nd appellant/respondents in contempt of the Consent Order of 6th May 2019, and
- b. to commit the said Taita Taveta County Government and Taita Taveta Public Service Board the 1st and 2nd appellant/respondents herein for a period not exceeding six months or any such period as may be directed by the honourable Court for disobeying the Consent Order of 6th May 2019..."

9. Essentially, the orders of contempt sought are against the respondents/appellants who are corporate entities, namely the, Taita Taveta County Government and Taita Taveta Public Service Board. Further, they seek to have the two entities committed to jail for a period of six months or such period as may be directed by this Court. This begs the question whether such orders can be granted against the respondents as corporate entities. A grant of such orders would require proof that an official or representative of those entities were served with, or aware of the orders alleged to have been disobeyed, and wilfully failed, refused and or neglected to obey the court orders, which are the key requirements of the law for committal for contempt of court. There is nothing in the record to show that the orders are sought against any such officer or representative of the respondents, or any culpable act or omission by such officer or representative.

10. It thus becomes apparent that the orders as sought are incapable of execution against the respondents. To grant them would, in effect, give rise to an absurdity. In the case of *B vs Attorney General* [2004] eKLR it was observed that;

"...the Court does not, and ought not to be seen to, make Orders in Vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people..."

11. Since courts do not issue orders in vain the result is that, the application is incompetent and is for dismissal. Having reached this conclusion, we need not consider the other grounds advanced by the parties.

12. As such, the application is hereby dismissed with costs to the respondents/appellants.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF OCTOBER 2022.



A.K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

