



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Union of Pre-Primary Education Teachers v Vihiga County Secretary (Mr Ezekiel Ayiego)
& 2 others (Cause E007 of 2024) [2025] KEELRC 477 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 477 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE E007 OF 2024
DN NDERITU, J
FEBRUARY 20, 2025**

BETWEEN

KENYA UNION OF PRE-PRIMARY EDUCATION TEACHERS CLAIMANT

AND

VIHIGA COUNTY SECRETARY (MR EZEKIEL AYIEGO) 1ST RESPONDENT

CHIEF OFFICER (MR DOMINIC LUVAVO) 2ND RESPONDENT

PAYROLL MANAGER (ADELAIDE MMAITSI) 3RD RESPONDENT

RULING

I. Introduction

1. In a notice of motion dated 26th September, 2024(the application) under certificate of urgency, the claimant/applicant is seeking orders that –
 - i. Spent.
 - ii. This honourable court be pleased to deny the contemnors audience on any matter before it where they are involved until they purge the contempt.
 - iii. The contemnors be summoned to show cause why they should not be punished for disobeying orders of this honourable court.
 - iv. This honourable court do commit the contemnors herein to 6 months imprisonment and a fine of Kshs. 200,000 each for being guilty of contempt of court order issued by this honourable court on 28th March, 2024.
 - v. Costs be provided by the respondents.



2. The application is expressed to be premised on Section 5 of the [Judicature Act](#) and Section 12 of the [Employment and Labour Relations Court Act](#). It is based on the grounds on the face of it.
3. The application is supported with the affidavit sworn by Samuel A. Opiyo on even date with several annexures thereto.
4. In opposition to the application, the respondents filed a replying affidavit sworn by Dominic Luvavo, the chief officer in charge of Education in the county, on 14th October, 2024 with several annexures thereto.
5. On 15th October, 2024 when the matter came up in court for directions the court directed that the application be canvassed by way of written submissions.
6. The claimant's representative, Mr. Samuel A. Opiyo, filed written submissions on 23rd October, 2024. The respondent's counsel, Miss Shijenje, filed on 5th November, 2024.

II. Evidence

7. In the supporting affidavit by Samuel A. Opiyo, it is deposed that the respondents were duly served with the court order issued on 28th March, 2024(A1) restraining them from terminating the claimant's members' employment. It is deposed that the respondents have deliberately chosen to ignore the orders.
8. It is further deposed that the respondents were further served with the court order dated 16th April, 2024 which ordered that all the claimant's members be reinstated to the payroll.
9. It is deposed further that the respondents were subsequently served with the consent order dated 29th April, 2024(A3) which intimated that the respondents had agreed to withdraw all disciplinary processes against the claimant's members pending the determination of the cause before court.
10. It is deposed that the 2nd respondent, despite being aware of the above orders of the court, went ahead and commenced disciplinary action against one Melvin Alivitsa and invited her to a disciplinary hearing(A4).
11. It is deposed that the deponent attended the disciplinary hearing on 14th August, 2024 at Mbale and the 2nd respondent chaired the same.
12. It is further deposed that one Adelaide Ashira and Melvin Alivitsa have not been reinstated to the payroll yet they continue working, and this is in violation of valid court orders.
13. In the replying affidavit by the 2nd respondent, it is deposed that the court order issued on 16th April, 2024 restricted the termination of the claimant's member's employment and directed that status quo be maintained as relates to their employment and to that end no action was taken against the claimant's members.
14. It is deposed that the 2nd respondent's department is not restricted from taking any administrative action such as a deployment of teachers or instituting disciplinary processes against its employees for acts not linked to the strike.
15. It is deposed that gagging the said department from undertaking any disciplinary action would licence indiscipline and lead to chaos.
16. It is deposed that on 20th May, 2024, Melvin Alivitsa (Melvin) was deployed to Vokoli Primary School (DL1) in Sabatia Sub-county as an ECDE Teacher, among other thirty-eight teachers (DL2).



17. It is deposed that no teachers complained about their transfer as they had either requested for the transfers or they were transferred to areas close to their home area. It is deposed that Melvin was likewise transferred to Vokoli, which is her home area, but she failed to report on 24th May, 2024.
18. It is deposed that Melvin did not protest her deployment but defiantly remained at Givudiany Primary School and failed to report at Vokoli Primary School (DL3).
19. It is deposed that the 2nd respondent wrote a letter dated 19th July 2024(DL4) to the Director of Human Resource and Management requesting the stoppage of Melvin's salary and commencement of disciplinary action against her and a show-cause letter was issued to her dated 26th June 2024(DL5).
20. It is deposed that Melvin is still in employment and her salary stoppage relates to her insubordination and not the strike.
21. It is deposed further that following the court order of 16th April, 2024, the 2nd respondent through a letter dated 24th May, 2024(DL7) requested the Director of Human Resource Development to pay all employees who reported to duty.
22. It is deposed that on the part of Adelaide Ashira, she was inadvertently left out as no disciplinary action is pending against her. It is deposed that her failure to inform the payroll manager did not help the situation. It is deposed that no vendetta is held against Adelaide Ashira and the respondent's inadvertence do not amount to contempt of court.

III. Submissions

20. Mr. Opiyo, the claimant's representative submitted that to prove contempt one must first demonstrate that the terms of the court order were clear and unambiguous. It is submitted that the court order of 16th April, 2024 was unambiguous to the effect that teachers were to resume duty and be paid their salary on resumption.
21. It is further to be proved that the alleged contemnors had the knowledge of and the terms of the orders. It is submitted that the 2nd respondent in his affidavit filed in court on his own behalf and on behalf of the other alleged contemnors acknowledged the existence of the order and its contents and meaning save that he interpreted it to mean that the said order could not limit the employer's right to undertake disciplinary action against employees for infractions not related to the strike.
22. It is submitted further that the third element to prove in contempt proceedings is that the respondents have breached the terms of the order. It is submitted that there is an admission by the 2nd respondent that he directed the stoppage of the salary of Melvin. It is submitted that in breach of the court orders of 29th April, 2024 the 2nd respondent transferred Melvin despite the clear and unambiguous terms that the status quo obtaining was to remain.
23. It is submitted that the respondents' conduct amounted to disobeying court orders and the same was deliberate by their failure to await the outcome of the conciliation whose report was filed in court on 28th June, 2024. Citing *Trusted Society of Human Rights Alliance V Cabinet Secretary for Devolution and Planning & 3 Others* (2017) eKLR, the court is urged to find that court orders are not made in vain and unless set aside they bind all those named to be affected in the manner stated in the order.
24. Citing *MNN V JMM* (2022) eKLR, the court is urged to find that the court orders breached by the respondents were in their knowledge, and they willfully disobeyed the same and are thus in contempt.
25. Further citing *Salim Peter Muriithi v Kasiwa Gona Kirao* (2021) eKLR it is submitted that court orders are preemptory and expressly binding and once disobeyed the court has to preserve its authority



and dignity and hold those disobeying in contempt. The court is urged to find that the respondents willfully disobeyed the court orders and hold them to be in contempt.

26. Citing *Miguna Miguna v Fred Okengo Matiang'I, Cabinet Secretary Ministry of Interior and Coordination of National Government & 6 others; Kenya National Commission on Human Rights (Interested Party)* [2018] eKLR, the court is urged to find that the consent order of 26th April, 2024 bound the parties and unless there was proof that it was obtained by fraud or collusion, no action was to be taken against the claimant's members pending the outcome of the conciliation process.
27. The court is urged to find that the application is merited and find the respondents in contempt.
28. The respondents' counsel submitted on two issues – Whether the respondents are in contempt of the court orders; and, Who is to pay costs for these proceedings.
29. On the first issue, it is submitted that for someone to be held in contempt, there must exist an order that has been willfully breached. It is submitted that the court order issued on 28th March, 2024 restrained the termination of the services of the claimant's members and that the status quo be maintained.
30. It is submitted that the circumstances at that time were that ECDE teachers had gone on a strike and they had been issued with show-cause letters for striking. It is submitted that the status then was that the respondents were not to terminate the claimant's members, and any disciplinary cases were to be abandoned. It is submitted that that did not mean that the respondent could not subject teachers to administrative actions subsequently for any other acts of discipline.
31. It is submitted that on 20th May, 2024 Melvin was duly deployed to Vokoli in Sabatia in compliance with the transfer schedule that had been prepared in February of that year, and the transfer of Melvin was necessary.
32. It is submitted that the current application is brought in disguise of contempt proceedings yet it is only a dissatisfaction by Melvin with her transfer.
33. It is submitted that in public service an employee is expected to report to their deployed station and then protest the transfer, which was not the case with Melvin.
34. It is submitted that the failure by Melvin to report to her new station is the reason for the issuance of a show cause letter and subsequent disciplinary proceedings and the same is not related to the strike at all.
35. Citing *Mutitika V Baharini Farm Limited (1985) KLR 229* it is submitted that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities although not beyond a reasonable doubt, which standard the claimant has not met. The court is urged to find that the contempt proceedings herein are frivolous and the same ought to be dismissed with costs.

IV. Analysis & Determination

20. The court has carefully read the application, the affidavit in support, the affidavit in response, and the written submissions by representatives for both parties, alongside all the cited authorities. The following issues commend themselves to the court for determination – Whether the respondents are in contempt of the court orders issued on 28th March, 2024; and, Who should meet the costs of this application.

a. The court order

20. The basis for contempt proceedings against the alleged contemnors is the alleged disobedience of a court order. It is a prerequisite that before one is held to be in contempt, it must be demonstrated



- there was a valid court order; that the respondent(s) was aware of the order he/she is alleged to be in contempt of. In other words, proof of service of the order is necessary unless, for reasons to be stated, the court dispenses with service of the order on the alleged contemnor.
21. The respondents herein assert that the order of 28th March, 2024 that the claimant alleges was breached related to ECDE teachers who had gone on strike and as a result of which the County Government of Vihiga issued show-cause letters and threatened to terminate the members of the claimant from employment. Those circumstances are distinct from the commencement of disciplinary action against Melvin who failed to report to work after she was deployed to a new school.
 22. The order of 28th March, 2024 stated as follows –

“That pending the hearing and determination of the application the respondent is hereby restrained from termination of the services of the members of the claimant and the status quo as of today be maintained.”
 20. The claimant asserts that the transfer of Melvin to a new school was undertaken two months after the above order was issued allegedly in violation of the said order.
 21. The application dated 28th March, 2024 upon which the order of 28th March 2024 was issued, sought for inter alia –

“That pending hearing and determination of the instant application the substantive application and the claim thereto, a conservatory order be issued restraining the respondents from in any way punishing the grievants for going on strike and for avoidance of doubt, status quo be maintained and any such action which might interfere with status quo to remain suspended....”
 20. A keen reading of the application indicates that the respondent had issued show-cause letters dated 26th March, 2024 to the members of the claimant for being absent from duty without leave on strike. Upon considering the said application the court issued the order of 28th March 2024 restraining the respondent from terminating the members of the claimant for being absent from duty during the strike and ordered that the status quo be maintained.
 21. Vide a consent entered on 16th April, 2024 the application dated 28th March, 2024 was compromised to the extent that the claimant’s members were to resume work and the issue of their unpaid salary referred to conciliation.
 22. A subsequent order dated 29th April, 2024 indicates that the show-cause letters that had been issued to the members of the claimant were suspended and hence there was no further threat of termination. The conciliation proceeded thereafter and a Conciliation Report dated 28th June 2024 was filed in court on even date, settling the claimant’s members’ issue on unpaid salary.
 23. The claimant argues that the transfer of Melvin to Vokoli Primary School and the subsequent disciplinary proceedings against her violated the court order of 28th March, 2024.
 24. It should be noted that the court order, the subject of the present contempt proceedings, related to restraining the respondents from terminating the ECDE teachers for participating in the strike. The order did not gag the County Government of Vihiga from transferring teachers from one school to another or the commencement of any other disciplinary action. Gaggling an employer from undertaking administrative action would amount to crippling its mandate and allowing employees to



act with undeterred impunity. The impugned order did not stop the transfer of teachers, but rather it restrained the respondents from terminating employees on the grounds of participating in the strike.

25. The order of 28th March, 2024 did not stop transfers and commencement of disciplinary action on other grounds other than for participating in a strike. The court agrees with the respondents that indeed there was no such order as to find the respondents herein guilty of the alleged contempt.

b. Service of the order and application

20. The other germane element in contempt proceedings is the personal service of the order. In *Nyamodi Ochieng Nyamogo & Another versus Kenya Posts & Telecommunications Corporation (1994) eKLR*, for instance, the court addressed the twin issues of the necessity for personal service of both the order and the application for contempt and the endorsement on the face of the order with the penal notice. In regard to service, the Court of Appeal noted as follows –

“The law on the question of service of order stresses the necessity of personal service. In *Halsbury’s Laws of England (4th Ed) Vol 9 on p 37 para 61* it is stated:

“61. Necessity of personal service. As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question ...” Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order ...”.

20. On the question of personal service of the order dated 28th March, 2024 upon the respondents named in the application, the said order was issued against the County Public Service Board and the County Secretary of the County Government of Vihiga. The claimant, in the supporting affidavit to the application, asserts that service was effected on even date. However, the order dated 28th March, 2024 does not bear any proof of service upon the respondents or indeed any other person. No affidavit of service was filed to show whether the service was effected on the alleged contemnors. The respondents named in the present application are the county secretary, the chief officer in charge of education, and the payroll manager, were not the respondents in the cause. There is no evidence of personal service on any of the three officers. Personal service is an elementary but a rather mandatory procedural requirement in contempt proceedings.

c. Penal notice

20. It is also a requirement that the order carries a warning and a notice of the penal consequences that may ensue if the order is not complied with. In this regard, there has to be permanently displayed on the front copy of the judgment or order served a warning to the person required to do or not to do the act in question that disobedience of the order shall be contempt of court punishable by imprisonment, a fine, or sequestration of assets (in case of a company). It has been held that without such display, the order may not be enforced unless it is an undertaking contained in an order (see *Mwangi Mangondu v Nairobi City Commission (Civil Appeal No 95 of 1988)*).
21. The 2nd respondent has agreed that Adelaide Ashira was inadvertently left out of the reinstatement to the payroll. The respondents have undertaken to ensure the reinstatement of Adelaide Ashira on the payroll and pay her withheld salaries as per the conciliation report dated 28th June, 2024.



V. Order

20. The court has said enough in demonstrating that the respondents are not in contempt of the order dated 28th March, 2024 as the transfer process was not addressed by the said order. The lack of evidence of personal service of the order and the absence of a penal notice of the face of the order makes commencement of contempt proceedings futile.
21. The court orders that –
- i. The application is not merited and the same is dismissed with no orders as to costs.
 - ii. Adelaide Ashira, as per the undertaking by the respondents, shall be reinstated into the payroll and all her withheld salaries shall be paid as per the conciliation report dated 28th June 2024.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 20TH DAY OF FEBRUARY, 2025.

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DAVID NDERITU
JUDGE

