



REPUBLIC OF KENYA



KENYA LAW
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**Otieno & 37 others v Union of Kenya Civil Servants & 3 others (Petition
E027 of 2023) [2025] KEELRC 659 (KLR) (4 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 659 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E027 OF 2023
NZIOKI WA MAKAU, J
MARCH 4, 2025**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES
10, 41, 50, 232 AND 258 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF: ALLEGED CONTRAVENTION OF
SECTION 44 AND 47 OF THE LABOUR RELATIONS ACT, 2012
AND
IN THE MATTER OF: ALLEGED CONTRAVENTION OF
ARTICLES 1 (A), 3(H), 5(D), 8(B), (E), (G), (J), 20(2) AND 25(2) OF
THE UNION OF KENYA CIVIL SERVANTS CONSTITUTION**

BETWEEN

**BENARD OTIENO 1ST PETITIONER
MALICK M SHANGUYA 2ND PETITIONER
PATRICK ODERO & 35 OTHERS & 35 OTHERS & 35 OTHERS & 35 OTHERS
& 35 OTHERS & 35 OTHERS 3RD PETITIONER
AND
UNION OF KENYA CIVIL SERVANTS 1ST RESPONDENT
TOM MBOYA ODEGE 2ND RESPONDENT
ALISOKOR MOHAMMUD ISHAQ 3RD RESPONDENT
ABDULMALIK A ABDALLA 4TH RESPONDENT**



RULING

1. The Petitioners' notice of motion application dated 29th November 2024 seeks the following orders:
 1. Spent
 2. That Leave be and is hereby granted to the firm of M/S Ruth Tanui & Company Advocates to come on record for the Petitioners/Applicants in place of the firm of M/S Otieno Aluoka and Company Advocates and that the consent between the Advocates, which consent is dated 29th November 2024 be deemed as duly filed.
 3. That the Honourable Court do find that the 2nd Respondent Mr Tom Mboya Odege, the 3rd Respondent Mr. Alisokor Mohammed and the 4th Respondent Mr. Abdul Malick are in contempt of court for disobedience of the orders of this Court issued on 31st January 2024.
 4. That upon grant of prayers 1,2 and 3 above, the Honourable Court do impose a fine or a penalty of Kshs 10,000,000/- (ten million) against the Respondents (contemnors) and in default of payment of such fine all movable and immovable assets of the Respondents including land and buildings be attached and sold in execution of this order to satisfy the penalty for contempt.
 5. That upon grant of prayers 3 and 4 above the court do issue an order that the above-mentioned Tom Mboya Odege, Alisokor Mohamud Ishaq and Abdulmalick. A. Abdalla be committed to civil jail for a period of 6 months.
 6. That this Honourable Court be pleased and do hereby order freezing of all the 1st Respondent's Bank Accounts Number 011201209xxxx held at the Cooperative Bank of Kenya; Bank Account Number 0102100320xxxx held at the National Bank of Kenya and Bank Account in the name of Union Of Kenva Civil Servants held at Elimu Sacco Society Limited and any other accounts in the name of the Union of Kenya Civil Servants head office, save for the mandatory expenses which include and limited to employees' salaries, branch and county allowances, rent office utilities and minimum miscellaneous expenses on a need be basis to be withdrawn by the Respondents immediate elected deputies/assistants or trustees as per the labour relation act with the approval of the court.
 7. That this honourable court be pleased and do hereby order the 2nd to 4th Respondents to be restrained from withdrawing and/or transacting from the 2nd Respondent's bank accounts held at Bank Account Number 011201209xxxx held at the Cooperative Bank of Kenya; Bank Account Number 0102100320xxxx held at National Bank of Kenya and Bank Account in the name of Union of Kenya Civil Servants held at Elimu Sacco Society Limited and any other accounts in the name of the Union of Kenya Civil Servants head office save for the mandatory expenses which include and limited to employees' salaries, branch and county allowances, rent, office utilities and



minimum miscellaneous expenses on a need basis until proper independent audit is done by an independent firm of auditors to be appointed by the Court.

8. That this Honourable Court be pleased and do hereby order an audit exercise be conducted with respect to all of the 1st Respondents' books of account, bank statement, all the documents that had been sought by the petitioners and all ancillary documents within 60 days and a report tabulated before this court.
 9. That this Honourable Court be pleased and do hereby order the Chairman of the Institute of Internal Auditors Kenya Chapter to avail to court 3 audit firms from which one can be selected to carry out an independent audit and same be fully paid for t the 1st Respondent.
 10. That this Honourable Court be pleased and do hereby give Orders directing the Officer Commanding Police Division (OCPD)- Central Police Station to provide for the security during the period of audit.
 11. That this Honourable Court be pleased and do hereby order the suspension of the 2nd Respondent Tom Mboya Odege, the 3rd Respondent Alisokor Mohammud Ishaq and the 4th Respondent AbdulMalick A. Abdalla to pave way for peaceful and independent exercises of audit and the Respondents immediate elected deputies/assistants or trustees as per the [Labour Relations Act](#) take over during the Audit period.
 12. Any other or further relief that this Honourable Court may deem it to grant.
 13. Costs of this application
2. On the 10th of December 2024, when the application came up for directions, the Court granted prayer 2 of the motion. It also ordered the freezing of the 1st Respondent's accounts—namely, account number 011201209xxxxat Cooperative Bank, 0102100320xxxx at National Bank, and an account held in the name of the Union of Kenya Civil Servants at Elimu Sacco Society Limited. Additionally, in the interim, the court froze any other accounts held in the name of the Union of Kenya Civil Servants, permitting withdrawals only for mandatory expenses such as employee salaries, rent, branch and county allowances, and office utilities.
 3. In support of the motion before the Court, the Petitioners contended that the 2nd, 3rd and 4th Respondents were in contempt for blatantly disregarding this court's judgment that had found them in breach of their fiduciary duty to make the 1st Respondent's books available for inspection. They asserted that despite the court's directive requiring the books of accounts to be availed within 15 days, the Respondents deliberately frustrated the process, noting that the 1st Petitioner had to travel to Nairobi three days before the deadline due to the Respondents' continued noncompliance. The Petitioners further alleged that the Respondents employed various underhanded tactics to obstruct the court orders, including physical harassment, forcing the 1st Petitioner to turn off his phone, coercing him into signing an oath of secrecy during the inspection, and unjustifiably denying him entry into the National Delegates Conference. They asserted that these actions constituted contempt of court and perpetuated gross financial mismanagement within the 1st Respondent.
 4. In response, the 1st Respondent filed a replying affidavit dated 16th December 2024 sworn by the 2nd Respondent. It contended that the court's order was not specific about which documents were to be availed for inspection, contrary to the Petitioners' assertions. The 1st Respondent maintained that the books had been made available and that the 1st Petitioner had duly inspected them, even appending



his signature in acknowledgment. Moreover, the 1st Respondent vehemently denied obstructing the inspection, asserting that other members present were also reviewing the documents on behalf of their respective branches. In addressing the 1st Petitioner's claim of being barred from attending the National Delegates Conference, the 1st Respondent stated that he was ineligible to attend due to his suspension. It also pointed out that the 2nd Respondent attended the conference and raised no concerns regarding financial mismanagement.

5. In conclusion, the 1st Respondent argued that the 1st Petitioner had failed to identify specific individuals who allegedly obstructed the inspection and was, in reality, attempting to file an appeal disguised as a contempt application.
6. Simultaneously, the 2nd Respondent raised a preliminary objection, asserting that the application violated the exhaustion doctrine, the prayers sought were *res judicata*, and that the court was *functus officio*. He specifically highlighted that prayers 3, 4 and 5 of the motion had already been sought and declined in the judgment of Kisumu ELRC Petition No. E008 of 2024, while prayers 6, 7, 8, 9, 10, 11 and 12 had been extensively canvassed and denied by this court.
7. The 3rd Respondent, in a replying affidavit dated 17th December 2024, largely reiterated the 2nd Respondent's sentiments but added that there was no evidence to support the claim that the 1st Petitioner was forced to sign an oath of secrecy. Similarly, the 4th Respondent, in his replying affidavit filed on 18th December 2024, stated that as the 1st Respondent's treasurer, he had made the books of accounts available for the 1st Petitioner's inspection. However, he clarified that the 1st Petitioner's request to take copies or photos of the documents was denied, as it was prohibited by the Union's constitution. He also emphasized that no evidence of harassment had been presented.
8. In a rejoinder, through a supplementary affidavit filed on 4th February 2025, the 1st Petitioner reaffirmed his position that the 2nd, 3rd and 4th Respondents were in contempt. He insisted that not all books of account had been made available and emphasized that the 3rd Respondent's admission—that the 1st Petitioner had been denied access to the National Delegates Conference due to his suspension—was, in itself, a violation of the court's judgment. On 5th February 2025, when the application came up for hearing, the court prioritized the issue of the frozen accounts. Following submissions from both parties, the court, in a ruling delivered on the same day, vacated the freeze order issued on 10th December 2024, and directed parties to file submissions on the issue of contempt.

Petitioners' submissions

9. In their submissions, the Petitioners outline the issues for determination as follows:
 - i. Whether the 2nd Respondents preliminary objection is merited.
 - ii. Whether the applicants have met the threshold for granting contempt of court orders.
10. On the first issue the Petitioners submit that prayers 3,4 and 5 are not *res judicata*, as Kisumu ELRC Pet. No. E008 of 2024 was not determined on its merits but was instead struck out. They cite the case of *Mary Wangari Kiarie v Safaricom (K) Ltd* [2021] eKLR, which emphasizes that for a matter to be considered *res judicata*, there must have been an adjudication conclusively determining the parties' rights. Furthermore, the Petitioners contend that the remaining prayers sought in the application differ from the remedies sought in this petition, contrary to the Respondent's allegations.
11. On the second issue, the Petitioners submit that they have proven the four elements of contempt enunciated in the case of *Katsuri v Kapurchand Depar Shah* [2016] eKLR. They maintain that the court order was clear and unambiguous, it was properly served on the Respondents, the Respondents



breached it, and their actions were deliberate. The Petitioners further submit that the Respondents failed to comply with the order to provide all books of account. They point out discrepancies in the documents availed for inspection, noting that those attached as “AA7” to the 4th Respondent’s replying affidavit sworn on 16th December 2024 were entirely different from those in the amended list attached to the 4th Respondent’s affidavit sworn on 27th January 2025.

12. Regarding the order allowing the Petitioners to raise concerns about the Union’s financial management at the National Delegates Conference, the Petitioners submit that the 1st Petitioner was denied entry into the conference. Additionally, they assert that although the 2nd Petitioner was present, he was denied the opportunity to address any issues despite numerous attempts.

1st and 4th Respondent’s submissions

13. The 1st and 4th Respondents submit that they fully complied with the court’s order and the 1st Respondent’s Constitution by availing all the books of account for inspection. While acknowledging that the specific documents sought by the 1st Petitioner may not have been immediately identifiable, they maintain that these documents were nonetheless included within the extensive records made available for inspection. Furthermore, they emphasize that the 1st Petitioner did not explicitly allege that the 4th Respondent interfered with the inspection process. In further opposition to the application, the 1st and 4th Respondents submit that it is barred by the principle of res-judicata. They draw attention to Kisumu Petition No. E008 of 2024, which was filed to enforce the judgment in this suit but was determined on its merits. They assert that the term “struck out” does not necessarily imply that the case was dismissed on a mere technicality. To support their argument, they cite the case of *Enock Kirao Mubanjji v Hamid Abdalla Mbarak* [2013] eKLR, where the Court underscored the importance of analysing the specific circumstances of each case before concluding that a party may file a fresh suit following a dismissal or striking out of a previous one.
14. The 1st and 4th Respondents reiterate that Kisumu Petition No. E008 of 2024 was disposed of on its merits and a judgment rendered. Finally, they submit that the present application extends beyond the proper scope of a contempt application by introducing issues that were not part of the court’s judgment. On this basis, they urge the court to dismiss the application with costs.

2nd Respondent’s submissions

15. The 2nd Respondent submits that no wilful disobedience can be attributed to him regarding the alleged failure to provide books of account for inspection. He points out that the 1st Petitioner inspected the books on 14th February 2024, as evidenced in the supporting affidavit. Furthermore, he asserts that there is no proof of deliberate non-compliance since the judgment did not specify the exact documents to be provided. In defence against contempt allegations, the 2nd Respondent submits that, as Secretary General, he is not responsible for maintaining the books of account. He contends that this responsibility falls solely under the purview of the National Treasurer, citing Articles 7 and 24 of the Union’s Constitution.
16. To further substantiate the claim that the 1st Petitioner inspected the books, the 2nd Respondent highlights the Petitioner’s acknowledgment of visiting the 1st Respondent’s offices, where the inspection was conducted in the presence of others. He refutes allegations that some documents were withheld, emphasizing that if any documents were missing, the 1st Petitioner had the opportunity to raise the issue immediately during the inspection. Additionally, 2nd Respondent maintains that the court order was fully complied with, as the inspection took place within the 15-day period stipulated by the Court. In the absence of evidence of wilful disobedience, the 2nd Respondent urges the Court to



exercise caution in finding contempt, noting the serious ramifications of such a decision. To support this position, he cites the case of *Gatharia K. Muthika v Baharini Farm Limited* [1985] KLR 227 which emphasized that contempt of court is a quasi-criminal offence requiring a high standard of proof though not necessarily beyond reasonable doubt. Additionally, that courts should exercise contempt jurisdiction cautiously ensuring it is not misused as a substitute for civil remedies where alternative legal avenues exist. And finally, that the key factor in determining contempt should be whether there has been an intentional and wilful violation of a court order.

17. The 2nd Respondent submits that compliance with the court order was complete upon the 1st Petitioner's inspection of the books on 14th February 2014. As such, he urges the Court to find that contempt does not arise. He cites the case of *Peter K Yego & others v Pauline Wekesa Kode* (Acc No. 194 of 2014) which stated that proof of disobedience of a court order was a prerequisite for a contempt finding. He also cites the case of *Katsuri Limited v Kapurchand Depor Shah* [2016] eKLR which agreed with the decision in *Kristen Carla Burchell v Barry Grant Burchell* (Eastern Cape Division case No. 364 of 2005), stated:

“in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order.”

18. Furthermore, the 2nd Respondent submits that granting the orders as currently framed would be prejudicial, as some of them presuppose that the Respondents have already been found guilty of contempt. In support of this argument, he relies on the Court of Appeal case of *Tetra Radio Limited v Communications Commission of Kenya* [2012] eKLR, where the court disapproved of litigants seeking presumptive prayers for committal as if a conviction for contempt had already been made.
19. With respect to the documents allegedly not provided, as listed in ground one of the motion the 2nd Respondent submits that these same documents were sought in Kisumu ELRC Petition No. E008 of 2024, which was ultimately struck out. Additionally, he points out that similar prayers, sought in an interlocutory application dated 29th September 2023, were denied. For this reason, he asserts that the prayer is res judicata and cannot serve as the basis for contempt proceedings. Lastly the 2nd Respondent submits that all the prayers sought and declined in Kisumu ELRC Petition No. E008 of 2024 cannot be granted in a post judgment motion. For this reason, he urges the Court to dismiss the application for being frivolous, vexatious and an abuse of the court process.

3rd Respondent's Submissions

20. The 3rd Respondent submits that this court lacks jurisdiction to grant prayers 6, 7, 8, 9 and 11 of the application, as they do not arise from the Court's judgment dated 31st January 2024. He further asserts that contempt must be proven to a higher standard than a balance of probabilities, akin to criminal proceedings, as established in *Sheila Cassat Isseberg & Watoto World Center v Anthony Machatha Kinyanjui* (Civil Suit 19 of 2020) (2021)KEHC 5692 (KLR) (2 July 2021) (Ruling). The 3rd Respondent asserts that there has to be a higher standard and submits that the potential loss of liberty for the alleged contemnor warrants strict proof. Accordingly, he contends that an applicant must demonstrate wilful and deliberate disobedience of a court order. In support of this position he cites the decision in the case of *Gatharia K Mutikika v Baharini Farm Limited* [1985] KLR 227, which held:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities,



almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and wilful violation of the order of the court, even to constitute a civil contempt."

21. In refuting the contempt, the 3rd Respondent further submits that he was not the custodian of the books of accounts and, therefore, did not deliberately disobey any court orders. Additionally, he asserts that, as the National Chairman of the 1st Respondent, he chaired the National Delegates Conference, which was attended by duly notified members. While acknowledging that the 1st Petitioner did not attend, he affirms that the Petitioners were represented by the 2nd Respondent, thereby fulfilling the judgment's requirements. Moreover, he submits that the 2nd Petitioner failed to demonstrate that he was prevented from raising the issue of financial mismanagement. To support this claim, he points to the minutes of the National Delegates Conference, which do not record any such incident. He thus urges the motion be disallowed.
22. The Court has considered the pleadings filed, the submissions of parties as well as the law in coming to this determination. Contempt of court is a criminal offence that is committed when someone wilfully disobeys a court order. In our realm, courts have the power to punish for both instances of contempt. As can be gleaned from the philosophy around it, the power to punish for contempt is to ensure the dignity of the judicial process is protected and in punishing for the contempt committed, a court exercises quasi-criminal powers as a contempt allegation must be proved on a higher standard than a balance of probability. This is because the freedom or liberty of a subject is at stake and therefore the standard to which proof for the offence is required to be on a slightly higher standard so as not to punish someone for what would otherwise not qualify as contempt or an innocent party. In this case, there is no proof that the alleged contemnors committed the offence of contempt.
23. The facts herein surrounding the alleged contempt have also been carefully assessed. For contempt to lie, it has to be established that there was wilful failure or refusal and/or neglect to obey the court order. Upon conclusion of the assessment of the facts surrounding the alleged contempt, I am not satisfied that the Petitioner has established wilful disregard of the court order by the alleged contemnors. It is clear there was an invitation to inspect the books of account with a caveat not to disclose the findings among other salient aspects of the compliance of the decision by Radido J. The Petitioners did attend the conference called by the 1st Respondent and had occasion to raise the issues subject of their Petition before Court. The Respondents do not seem to have abridged the Petitioners rights nor act contrary to the directions issued in the Judgment subject of the motion before me. Additionally, it is noted that in the motion before the Court, there is a series of prayers which mimic the Petition itself and which formed the corpus of the determination in the Petition herein. It is inappropriate for parties to litigate on issues already determined in prior pronouncements of the Court. It serves no useful purpose to revisit them in post judgment applications such as the one before the Court. The Court in sum finds the motion before it does not satisfy the prerequisites for the court to grant the orders sought, I accordingly dismiss the Petitioner applicant's application dated 29th November 2024 with costs to the Respondents.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF MARCH 2025

NZIOKI WA MAKAU, MCIARB.



JUDGE

