



**Mkaya v County Government of Taita Taveta & another (Constitutional  
Petition E007 of 2024) [2025] KEELRC 1176 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1176 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CONSTITUTIONAL PETITION E007 OF 2024**

**K OCHARO, J**

**APRIL 24, 2025**

**BETWEEN**

**GIFTON H MKAYA ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF TAITA TAVETA ..... 1<sup>ST</sup> RESPONDENT**

**GOVERNOR TAITA TAVETA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. By a notice of motion dated 26<sup>th</sup> of February 2025, expressed to be under section Act 3A of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules, section 5[1] of the *Judicature Act*, and Article 159 of *the Constitution* of Kenya, 2010, the Petitioner / Applicant seeks;
  - I. That the application be certified urgent and the service be dispensed with in the first instance.
  - II. That, there be and is hereby issued a conservatory order barring the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from appointing a replacement and or implementing the contents of the letter of 24<sup>th</sup> February 2025 pending hearing and determination of this application.
  - III. That, there be and is hereby issued an order citing the Governor of Taita Taveta, H.E. Dr. Andrew Mwadime, for contempt of a conservatory order of this Honourable Court issued on 2<sup>nd</sup> July 2024.
  - IV. That, upon citation for contempt, the aforesaid Governor of Taita Taveta, H.E. Dr. Andrew Mwadime, be sanctioned by committal to civil jail, sequestration of property, payment of a fine, or any further orders.



- V. That this Honourable Court make any further or other orders to restore its reputation and dignity.
  - VI. That the costs of this Application be borne by the Governor of Taita Taveta, H.E. Dr. Andrew Mwadime.
2. The application is premised on the grounds set out on the face of the application and on the supporting affidavit sworn by the Applicant on 26<sup>th</sup> February 2025.
  3. The 2<sup>nd</sup> Respondent resists the Application upon the grounds placed forth on his response affidavit sworn on the 5<sup>th</sup> of March 2025.
  4. Counsel for the parties made oral submissions for and against the application on 6<sup>th</sup> March 2025.

### **The Application**

5. The Application is premised on the following prime grounds;
  - I. That this court issued conservatory orders on 2<sup>nd</sup> July 2024, barring the Respondents herein from commencing, continuing, and or concluding any disciplinary action against the Petitioner pending the hearing and determination dated 30<sup>th</sup> June 2024.
  - II. Upon service of the petition and order on the Respondents, they appointed Counsel, who appeared in court until 12 February 2025, when the orders were extended pending the hearing and determination of the petition.
  - III. This court's orders of 12 February 2025 are still in force as they have never been successfully appealed against, reviewed, or set aside.
  - IV. In reckless disregard of this court's authority to adjudicate disputes, the Petitioner/Applicant was served with a dismissal letter dated 24 February 2025, communicating the 2<sup>nd</sup> Respondent's decision to dismiss him from employment.
  - V. Further, the Applicant received a press release dated 24 February 2025 from the County Director of Communications indicating that the Deputy Governor, H.E. Christine Kilalo, had been assigned the portfolio and would assume that role upon handover. Therefore, it is necessary to intervene against the handover.
  - VI. Despite service and obviously being aware of the court order, the 2<sup>nd</sup> Respondent, H.E. Dr. Andrew Mwadime, refused to restrain himself from commencing further disciplinary proceedings, blatantly disregarding the authority of this court.
  - VII. This Court is seized with jurisdiction to punish any person for contempt.

### **The 2<sup>nd</sup> Respondent's Response**

6. As can be discerned from the above-mentioned replying affidavit, the Applicant's instant application is opposed on the following grounds;
  - I. The Petitioner/ Applicant has deliberately concealed from this Court that the grounds leading to his termination are radically different, separate and distinct from those that gave rise to the petition herein.



- II. Contrary to the impression created by the Applicant, the 2<sup>nd</sup> Respondent is a law-abiding citizen who is always respectful of court proceedings and orders. He is not in contempt of the court order.
- III. Disciplinary action had been commenced against the Applicant on the account of using his position and authority to harass men sexually. After the issuance of the restraining court order, the Respondents halted the disciplinary process.
- IV. The order granted arose from a cause of action founded on the allegations against the Applicant of sexual harassment. It was limited to matters related or incidental to such similar or related accusations.
- V. This court's order of 3rd July 2024 did not bar the termination of the Applicant's employment where other grounds called for the termination. Further, it did not give him a licence to misconduct himself for reasons of the existence of the Court order without care that there would be disciplinary sanctions.
- VI. The termination of the Applicant's employment on 24<sup>th</sup> February 2025 was on the basis of his incompetence, gross misconduct and abuse of office. The details thereof were set out in the termination letter.
- VII. The termination was therefore in good faith and in the general public's best interest.
- VIII. The orders sought barring the appointment of a replacement and or the implementation of the contents of the letter of 24<sup>th</sup> February 2025 have been overtaken by events. The termination has already taken effect.
- IX. The remedies sought cannot issue for want of compliance with the exhaustion doctrine.

#### **The Petitioner's/ Applicant's Submissions.**

7. Counsel for the Applicant, Mr. Kosgei, submitted that on the 2<sup>nd</sup> of July 2024, this court gave an order restraining the Respondents from interfering with the employment of the Applicant, pending the hearing and determination of his application. By consent of Counsel for the parties, on 17<sup>th</sup> February 2025, the interim order was extended pending the determination of the petition herein.
8. In his response to the instant application, the 1<sup>st</sup> Respondent hasn't challenged the validity of the orders. The orders are still in force. They have not been successfully assailed by way of an appeal or an application to set aside.
9. The summary dismissal of the Applicant from employment is a blatant violation of this court's clear and unequivocal order that was given to preserve the substratum of the petition. That substratum is whether the governor has the power to fire a county executive member in the manner he intended to.
10. It hasn't been denied that the order was given and is in force, and the 2<sup>nd</sup> Respondent knew its existence. Thus, the Applicant has met the requisite threshold for a grant of the orders sought in the instant application.
11. The 2<sup>nd</sup> Respondent's explanation is too insufficient to exonerate him from being in contempt of the Court order. It is clear that he dismissed the Petitioner on the same ground of sexual harassment, the misconduct of which was the subject matter of the show cause letter. The 2<sup>nd</sup> Respondent's assertion that the reasons for the dismissal are different from those borne in the show cause letter is untrue,



- misleading, and a misguided attempt to run away from the consequences of a blatant disobedience of a Court order.
12. Counsel for the Respondents, in rejoinder, stated that though the Applicant has in his Notice of Motion, sought *inter alia*, a conservatory order, his Counsel didn't address this limb of the application; it should therefore be assumed that the same was abandoned.
  13. Additionally, what the Applicant wants conserved cannot be conserved as the employment termination has already occurred. Counsel cited the decision in Eric Muuthuri *Nyamu v Ministry of Water and Sanitation Petition E043 OF 2022* to support these submissions.
  14. Further reliance was placed on the decision in Obuya Bagaka v Kenya School of Government [2019] eKLR. To allow the prayer for a conservatory order in the circumstances of this matter shall tantamount to reinstating the Petitioner/Applicant without first hearing the parties.
  15. Section 77 [1] & [2] of the County Government Act vests the jurisdiction of the matter at hand in the Public Service Commission. Subsection 2 provides that the Commission has jurisdiction over appeals relating to decisions on matters of employment. As such, this court isn't the proper forum to entertain the instant dispute.
  16. It was further argued that where a statutory mechanism is set for the resolution of a particular kind of dispute, a party isn't allowed to bypass the mechanism and approach the court directly. To fortify these submissions, Counsel placed reliance on the Court of Appeal decision in the Secretary County Public Service Board, Wajir & Another v Hulbhai Gedi[2017] eKLR.
  17. Sections 3 and 5 of the *Judicature Act* provide for contempt proceedings. Section 3 allows the applicability of common law in our practice. Kenyan courts are guided by the applicable English law at the time when determining applications for contempt. As such, before a party moves the court for orders of sanction[s] for contempt of court against another, it behoves him or her to ascertain the applicable law in England at the time of filing the application. Counsel cited the decision in Gurparsh Singh & Sons – Application No. 50 of 1993, to buttress these submissions.
  18. In the instant application, the Applicant failed to ascertain the law obtaining in England at the time of filing the same. The law applicable in England currently is embodied in the Civil Procedure Rules of England that came into force on 1<sup>st</sup> October 2021. Under the Rules, Part 81, the applicable procedure is not a Notice of Motion, but an Application of Notice. The Application of Notice must set out the grounds on which the application is based. It must identify separately and numerically list each act of contempt that is being alleged. The Applicant's application should fail.
  19. It is trite that for an application for contempt like the current application to succeed, it must be demonstrated beyond a reasonable doubt that;
    - a. The terms of the order were unambiguous. As to whether the order is unambiguous, the facts on which the issuance of the particular order is based must be analysed. It should be borne in mind that the order was issued following the fact that the Applicant had been issued a show cause letter on the subject matter of sexual harassment. The order did not bar termination of his employment on any other ground in the event there was a justified need to.

The grounds that gave rise to the termination of the Petitioner's employment had nothing to do with the facts that gave rise to the petition herein.
    - b. That the alleged contemnor acted in deliberate disregard of the order of the court. The 2<sup>nd</sup> Respondent is a mathematician. He takes legal advice from the County Attorney. It is possible



that the 2<sup>nd</sup> Respondent was not aware of the scope of the order that it barred dismissal on any other grounds.

- c. The application was made as a last resort.
20. The contents of the replying affidavit have not been rebutted.

### **Analysis and Determination**

21. I have carefully considered the Applicant's application, the grounds upon which it is premised, the affidavit in support of the application, the replying affidavit by the 2<sup>nd</sup> Respondent, and the submissions by Counsel for the parties and the following issues emerge for determination;
- I. Was the summary dismissal of the Petitioner/ Applicant from employment for reasons other than sexual harassment?
- II. Did the order of 2<sup>nd</sup> July 2024 bar disciplinary action on other grounds beyond the sexual harassment ground?
- III. Whether the 2<sup>nd</sup> Respondent is guilty of contempt of the court order herein of 2<sup>nd</sup> July 2024, and extended on 12<sup>th</sup> February 2025.
22. It isn't in dispute that on 12 June 2024, the 1st Respondent issued the Petitioner a show-cause letter informing him that a complaint of sexual harassment of one of the 1<sup>st</sup> Respondent's male employees had been made against him. He was supposed to show cause why disciplinary action could not be taken against him.
23. The petition, the application dated 30 June 2024, which was contemporaneously filed therewith, and the ensuing order of 2 July 2024 had their root in the issuance of the show cause letter.
24. Undoubtedly, while this petition is pending, and the order of 2<sup>nd</sup> July 2024 and extended on 12<sup>th</sup> February 2025 remain unchallenged in any of those manners recognised in law, the 1<sup>st</sup> Respondent summarily dismissed the Petitioner from employment on 24<sup>th</sup> February 2025. Among the defences raised by the 2<sup>nd</sup> Respondent against the application for contempt herein is that the dismissal was on account of reasons other than the sexual harassment, making it imperative for this court to, from the outset, determine this distilled issue.
25. The summary dismissal letter dated 24<sup>th</sup> February 2025, read:

“This letter serves as formal notice of your dismissal from the position of the Executive Committee Member for Health Services, effective 24<sup>th</sup> February 2025.

The decision to relieve you of your duties has been necessitated by serious concerns regarding your performance and conduct, which have significantly compromised the effective delivery of healthcare services within the country.

The grounds for your dismissal include;

- I. Incompetence

You have demonstrated an inability to effectively discharge the duties assigned to your office, leading to severe inefficiencies in healthcare service delivery within the County. Key indicators include failure to address key healthcare challenges, poor coordination of the healthcare function, failure to formulate key



policies for the administration of health matters, persistent wrangles and breakdown in communication and cooperation between yourself, the County Chief Officer and key stakeholders including healthcare workers, administrators and County leadership resulting to dysfunctional health system.

II. Gross Misconduct

You have engaged in gross misconduct, including but not limited to repeated absence from County Executive Cabinet meetings without providing any formal apology of justification and failure to adhere to the Cabinet resolution on shifting your office from Sunday Sub-County to Voi Sub-County, for efficient operations of the Department.

III. Abuse of Office

You have abused your office by engaging in an unauthorised benchmarking trip using public funds amounting to KShs. 1.8 million from the Facility Improvement Fund [FIF]. This has happened while patients continue to suffer due to the lack of essential drugs, inadequate meals, and poor sanitation in healthcare facilities.....

In view of the foregoing and in line with the powers granted to me by Section 31[a] of the County Government Act, I hereby dismiss you from office effective today.....”

26. Considering the contents of the dismissal letter keenly and elaborately, it isn't challenging to find that the summary dismissal was anchored on radically different grounds from those that were set out in the show cause letter mentioned above. Therefore, the Petitioner's argument that he was dismissed on the ground of sexual harassment, which the Respondents had been barred from using as a basis for terminating his employment pending appeal, is misguided and stands on shifting sand.

27. The order of 2<sup>nd</sup> July 2024 directed;

- a. ....
- b. In the interim, a conservatory order is hereby issued barring the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from commencing, continuing or concluding any disciplinary proceedings against Mr. Gifton H. Makaya or in any manner adversely interfering with his employment as the County Executive Committee Member [CECM] of Health, Taita-Taveta County.
- c. ....”

28. To fully understand the intended scope of a Court order, the facts forming the cause of action, of the matter in which the order was issued, are pivotal and must be scrutinised with keenness. I have carefully considered the facts in the instant matter, they duly revolve around the alleged sexual harassment. They didn't speak to some speculative and futuristic infractions. The Court was not invited to give protection against a process geared towards dismissal of the Petitioner or his dismissal from employment on grounds other than that which was the subject matter of the show cause letter, the root of the proceedings herein. In the circumstances of the instant matter and how the order was



couched, asserting that the order barred the Respondents from disciplining the Petitioner even on other grounds would equate defiance to logic and reasonableness.

29. To grant the orders sought shall amount to granting the same on a cause of action that is totally new and not embodied in the current petition. Absurdity shall abound. The essence of pleadings shall be rendered nonsense.
30. Having concluded as I have hereinabove, the Petitioner's application, which is duly anchored on the prime fact that he was summarily dismissed on the ground of an alleged sexual harassment, as such in flagrant disobedience of the court order, must fail at this point.
31. In the premises, I have no reason to delve further into the third identified issue, as by so doing, I shall be indulging in an academic exercise and a non-use of the precious judicial time prudently.
32. In the upshot, I find the Petitioner's / Applicant's application lacking in merit and I hereby dismiss the same.
33. Orders accordingly.

**READ, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 24<sup>TH</sup>**

**DAY OF APRIL, 2025.**

**OCHARO KEBIRA**

**JUDGE**

