



**Kenya Union of Clinical Officers (KUCO) v Nairobi City County
Government & 2 others (Employment and Labour Relations Petition
E180 of 2023) [2024] KEELRC 274 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 274 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E180 OF 2023
AN MWAURE, J
FEBRUARY 13, 2024**

BETWEEN

THE KENYA UNION OF CLINICAL OFFICERS (KUCO) PETITIONER

AND

THE NAIROBI CITY COUNTY GOVERNMENT 1ST RESPONDENT

THE NAIROBI CITY COUNTY PUBLIC SERVICE BOARD. 2ND RESPONDENT

THE PUBLIC SERVICE COMMISSION 3RD RESPONDENT

RULING

1. The applicants filed a Notice of Motion dated 28th November 2023 seeking orders that:
 1. Spent
 2. This court be pleased to declare and hold that, having been served/being aware of the Orders this Honourable Court gave on 24th October, 2023, Respondent/ Contemnors herein Mr. Patrick Analo Akivaga being The County Secretary and Head of Public Service of The 2nd Respondent together with Mr. Nyamwaya Nyagara Being The (Ag) Secretary & Chief Executive Officer of The 1st Respondent and The Entire Board Members have disobeyed those orders and hence in civil contempt of court.
 3. The said Respondent/ Contemnors herein, Mr. Patrick Analo Akivaga being The County Secretary and Head of Public Service of The 2nd Respondent together with Mr. Nyamwaya Nyagara being the (Ag) Secretary & Chief Executive Officer of the 1st Respondent and the Entire Board Members be sanctioned as this court may deem fit and appropriate including committing to civil jail for a period of six months or each to pay the sum of Kenya Shillings one hundred thousand or both.



4. The Contemnors herein be denied audience by this Honorable Court, until they purge the contempt of the court which has impeded and continues to impede the course of justice in this matter.
 5. The costs of this application be borne personally, jointly and severally by the Contemnors, on full indemnity basis.
2. The Application was supported by an Affidavit sworn by George M. Gibore, the General Secretary of the Applicant

Petitioner/ Applicant's Case

3. The Petitioner/ Applicant avers that this court issued an order on 24.10.2023, restraining and prohibiting the Respondents from advertising, interviewing and/or recruiting for any position of clinical officers, continuing with such recruitment process or from allowing such new clinical officers (if already recruited) from assuming office, before first absorbing the grievants on permanent and pensionable terms.
4. The Petitioner/ Applicant avers that in disobedience of the court order, the Respondents/Contemnors have proceeded to advertise, interviewed and recruited clinical officers.
5. The Petitioner/ Applicant avers that vide a notice dated 10.11.2023, the Respondents/Contemnors circulated and issued a notice of shortlisted candidates for the position of various Medical Officers Job Groups, and set interview dates for the personals so shortlisted disregarding the court orders they are well aware of.
6. The Petitioner/ Applicant avers that the Respondents' Advocates were present in court when the court gave its orders; and upon extracting the said orders, the Applicant served the same upon the Respondents' Advocates herein on 27.10.2023, which was duly acknowledged as stated in the Affidavit of Service of Esther Kabura sworn on 30.10.2023.
7. The Petitioner/ Applicant avers that in total disregard and wilful disobedience of the said orders by continuing with the recruitment process of new clinical officers despite the orders of this court, prohibiting them to do so.
8. The Petitioner/ Applicant avers that it stands to suffer great loss and prejudice which will render its grievant members jobless at the end of their contracts in March 2024 and erode the substratum of this suit, to the irreparable prejudice of the grievants.
9. The Petitioner/ Applicant avers that the Respondents'/ Contemnors disobedience is designed to defeat justice by rendering the court orders given on 24.10.2023 a nullity and the Applicant's petition herein an academic exercise to the detriment of the Applicant's members.

Respondents/ Contemnors' Case

10. In opposition to the Application, the Respondents/ Contemnors' filed an affidavit dated 19.12.2023.
11. The Respondents/ Contemnors' aver that the Court orders as served upon our advocates have not been breached in any way as the recruitment process was already underway when the suit was instituted but the process ends only upon recruitment of staff which has not happened hence the application is speculative and presumptive.
12. The Respondents/ Contemnors' aver that the recruitment process for various cadres under the Health Nutrition and Wellness sector including 26 clinical officers began on 18.08.2023 through



- advertisement of positions on the County Public Service Board official website accessible by all members of the public and the recruitment process has been continuing since then.
13. The Respondents/ Contemnors' aver that ongoing process does not affect the terms of service of the Petitioner's members as they are on contracts which expire on or about March 2024.
 14. The Respondents/ Contemnors' aver that if the 2nd Respondent does not proceed with the recruitment there is likely to be a gap once the contractual officers leave service and may lead to the collapse of service delivery to the citizens of Nairobi and it is likely to cause a crisis.
 15. The Respondents/ Contemnors' aver that there has been a myriad of court orders issued by the High Court allowing the recruitment process within the Health Nutrition and Wellness Sector to continue. Therefore, they cannot be held to be in contempt when there exist two conflicting orders from the same High Court. There is a need to harmonize the proceedings to avoid any conflicts in the decisions by the Court.
 16. The Respondents/ Contemnors' aver that the Petitioner has neglected refused and or declined to comply with the court's directions of 31.10.2023 directing parties to file and exchange submissions within 10 days each and take a date for Judgment on 6.12.2023.
 17. The Respondents/ Contemnors' aver that the Petitioner has been seating on interim orders granted and has not complied with the court's directions to delay the hearing of this suit and precipitate a crisis within the public health system of Nairobi County for their malicious benefit.

Analysis and Determination

18. The court has considered the pleadings and submissions hereto. In *Muthui v Kenya Rural Roads Authority (KERRA)* (Petition E210 of 2021) [2023] KEELRC 793 (KLR) (28 March 2023) (Ruling), the court held that:

“Contempt of court is a matter now addressed by superior courts at length. This happens where a response having been fully aware of the courts orders, goes ahead and deliberately fails to comply with the same without any good justification as held in *MNN v JMM* [2022] eKLR.

The rationale of a judgment, decree and orders of court is that a party having moved court, upon the reasons addressed, the orders issued should be obeyed by the party the same is directed at. It is not a case of either or to obey. On the orders made, unless set aside, the requirement is to obey.

In giving this emphasis, the court in *Econet Wireless Kenya Limited v Minister for Information and Communication of Kenya Authority* [2005] eKLR held that;

It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void”

19. The court issued a conservatory order on 24.10.2023, prohibiting the Respondents from advertising, interviewing and/or recruiting for any position of clinical officers, continuing such recruitment process or from allowing new clinical officer (if already recruited) from assuming office, before first absorbing



the Petitioners on permanent and pensionable terms pending the determination of the Application dated 20th September 2023.

20. This court disagrees with the Respondents/ Contemnors' that they have not breached the court order as the recruitment process was already underway when the suit was instituted. The court order is very clear that they are prohibited from continuing such recruitment regardless of when it will end, the Respondents/ Contemnors' action of circulating a notice dated 10.11.2023, and issuing a notice of shortlisted candidates for the position of various Medical Officers Job Groups including 26 clinical officers, and setting interview dates is in breach of the court order. Court orders must be obeyed to preserve the rule of law as held in various cases including the cited ones hereinbefore – *Muthui vs Kenya Rural Roads Authority supra* and *Econet wireless Kenya Limited vs Minister for Informational and Communication of Kenya (supra)*
21. If aggrieved by the court order and the Petitioner's alleged actions of frustrating the court process, the Respondents should have lodged an application in court for the discharge of the court order dated 24.10.2023 or renewal of the same as appropriate.
22. Further, the Respondents aver that there are other orders from the High Court allowing for them to proceed with the recruitment process but failed to state the case number and/or provide the said orders. In any case the independent court orders as already stated must be obeyed unless set aside.
23. This court takes note that the Respondents/ Contemnors' vide their CEO/Board secretary Mr Nyamwaya Nyagara filed a further affidavit however dated 18th January 2024 in which they informed the court that vide a public notice dated 15th January 2024, they advised the shortlisted candidates and the general public that the scheduled interviews for 17th, 18th and 23rd January 2024 would not proceed until further notice.
24. The above action has therefore exonerated the contemnors from contempt of court since the said interviews of clinical officers of job groups "H" and registered clinical officer job group "K" were postponed as per the court order dated 27th November 2023.
25. The application for contempt of court is therefore dismissed as is overtaken by events.
26. Each party will bear their respective costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF FEBRUARY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.



A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

