



**Kenya National Union of Nurses v Garissa County Public Service Board
(Cause E001 of 2022) [2024] KEELRC 223 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 223 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E001 OF 2022
ON MAKAU, J
FEBRUARY 9, 2024**

BETWEEN
KENYA NATIONAL UNION OF NURSES CLAIMANT
AND
GARISSA COUNTY PUBLIC SERVICE BOARD RESPONDENT

RULING

1. On 31st October, 2022 Marete J delivered judgment in favour of the claimant in the following terms: -
 - i. The respondent be and is hereby ordered to meet and pay Mary Kanario Mpekethu P/NO xxxx her 10 months withheld salary for the months of June 2019 to April 2020.
 - ii. The respondent be and is hereby ordered to meet and pay Felix Mokandu Angasa P /NO-xxxx his 2 months withheld salary for the months of March and April 2020.
 - iii. That the respondent be and is hereby ordered to instantly promote Mary Kanario Mpekethu P/NO xxxx to Job Group N.
 - iv. That the respondent be and is hereby ordered to meet and pay Mary Kanario Mpekethu P/ NO xxxx all the difference in salary and emoluments between Job Group N and her current salary for all the time of unlawful denial of promotion to the date of such payment.
 - v. An order be and is hereby issued restraining the respondent, its Agents, servants, and/or Assigns and/or servants from victimizing the grievant nurses herein on account of this suit.
 - vi. The cost of this cause shall be borne by the Respondent.
2. The respondent failed to comply with the said judgment and the claimant filed the instant Notice of Motion dated 28th March 2023 seeking the following orders:



- a. That, summons be issued to the following persons to show cause why they should not be punished for contempt of court.
 - b. That, the contemnors be denied audience of court until they purge the contempt.
 - c. That Mohamud Hassan Mursal County Secretary, Garissa County Public Service be committed to civil jail for a period of 6 months for contempt of court.
 - d. That, Hidik Mohamed the Director, Human Resource Management, Garissa County Public Service Board be committed to civil jail for a period of 6 months for contempt of court.
 - e. That Ibrahim Korow the Payroll Manager, Garissa County Public Service Board be committed to civil jail for a period of 6 months for contempt of court.
 - f. That, any other order the court may deem fit to grant in the interest of justice.
3. The motion is brought under section 63(c) of the *Civil Procedure Act* Cap 21, section 5 of the *Judicature Act* and all other enabling provisions of the law. It is supported by an Affidavit sworn by Mr. Tyson Kinoti on 28th March 2023. In brief, the claimant contends that the respondent was made aware of the said judgment but willfully failed to comply with the orders therein. Consequently, it prays for the aforesaid three officers of Garissa County Government to be punished for contempt of court.
 4. The respondent reacted to the claimant's motion by filing an application for setting aside the said judgment on ground that court process had not been effected before the judgment. However, the application was without merits and ended up being dismissed.
 5. In addition to the failed attempt, the respondent filed a Replying Affidavit sworn on 22nd May 2023 by Khadija Ahmed Mohammed, Legal Advisor of Garissa County Government. In brief, affiant deposed that the respondent had complied with part of the judgment and sought to challenge the rest of the judgment concerning the case of Mary Kanario (one of the grievants).

Submissions

6. The claimant submitted that the officers named as contemnors have disobeyed the court orders deliberately and they ought to be punished for contempt of court. It contended that court decisions bind all persons to whom they apply and as such the officers named ought to be punished for failing to implement the orders which was their responsibility to do so.
7. It submitted that the disobedience was deliberate since they persisted even after the respondent's CEO wrote a letter to them and while fully aware that the respondent had approved the promotion of the grievant.
8. It submitted that for purpose of rule of law and administration of justice the contemnors should be punished.
9. The respondent, on the other hand submitted that the application is incompetent as it does not accord with the legal procedure for executing decrees against the government under section 21 (1) of the *Government Proceedings Act* Cap 40 Laws of Kenya. It further submitted that the above law requires that a party wishing to execute a judgment against the government must first obtain a certificate of order against the government. It submitted that in this case the claimant has not been issued with any order against the Government and therefore the application is incompetent.
10. The respondent further submitted that even where an order against the government has been issued, no execution can be done against any individual officer except where one seeks for a writ of mandamus



compelling the relevant officer of the government to honor the decree. It cited Republic v The Attorney General & another Exparte James Alfred Kosoro (2013) eKLR to fortify its submissions. It also cited Republic v Attorney General & another Exparte Stephen Wanyee Roki (2016) eKLR and prayed for the application to be dismissed with costs.

Issues for determination

11. The issues commending themselves for determination are:
 - a. Whether the instant motion is fatally incompetent.
 - b. Whether the orders sought by the motion are merited.

Incompetent motion

12. The application seeks to have the three named officers punished for failure to implement the judgment of the court herein. The respondent contends that the motion is in essence executing the Judgment prematurely and wrongfully since there is no order issued against the government and no writ of mandamus has been sought to the said officers.
13. I am persuaded by the respondent's submissions. The contempt proceedings are premature because no order against the government has been issued and served as required by section 21 of Government Proceedings Act. Further, no writ of mandamus has been sought and issued against the three officers named for contempt.
14. I gather support from the case of Republic v The Attorney General & another Exparte James Alfred Kosoro supra, where Odunga J (as he then was) held that:
 - 19 ...in seeking an order of mandamus the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do...
 20. Where therefore a public officer declines to perform the duty after the issuance of an order of mandamus, his/her action amounts to insubordination and contempt of court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are meant to show the court's displeasure at the failure by a servant of the state to comply with the directive of the court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."
15. In view of the foregoing matters, I find and hold that the application herein is fatally incompetent, for being brought prematurely. Consequently, it stands dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF FEBRUARY, 2024.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

