



Misango v Human Resources Kiambu & 5 others (Cause E570 of 2023) [2024] KEELRC 120 (KLR) (1 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 120 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E570 OF 2023
NZIOKI WA MAKAU, J
FEBRUARY 1, 2024**

BETWEEN

DR. SAMSON ROBERT MISANGO CLAIMANT

AND

HUMAN RESOURCES KIAMBU & 5 OTHERS RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 25th September 2023 seeking to be heard for Orders:
 - a. That the Court does hold that the Respondents action constitutes disobedience of the Order of the Court made on the 31st day of July, 2023.
 - b. That the Court does commit the Respondents to civil jail for a term not less than six (6) months or such other terms as this Court would consider fit in the circumstances.
 - c. That in the circumstances, the Respondents be ordered to pay a fine of not less than Kshs. 500,000.00 for contempt of Court.
 - d. Any further orders or directions as the Court would make in the circumstances.
 - e. Costs of this Application.
2. The Application was premised on the grounds set out on the face of the motion and was further supported by the sworn Affidavit of the Claimant/Applicant who averred that this Court issued an order on 31st July 2023 that his salary for June and July be paid as well as any succeeding month where he remains employee of the Respondents and serves as surgeon at the 5th Respondent Hospital. That the Court further directed that there be compliance of the Orders or the Respondents will not have audience before Court. The Claimant further averred that despite the Respondents being duly served with the said Order, they have failed and/or refused to comply and persist in such refusal in contempt



of Court. He asserted that he had no other way of enforcing the said Court Order and prayed to this Court to commit the Respondents to civil jail in the interest of justice as prayed in his Application.

3. In response, the Respondent filed a Replying Affidavit and Further Affidavit sworn by Ms. Waithira Waiyaki on 20th November 2023 and 4th December 2023 respectively. Ms. Waiyaki denied that the Respondents were in contempt of the said Court Orders, arguing that the matter had been commenced unprocedurally as no appeal was lodged before the Public Service Commission (PSC). She averred that the County Public Service Board (hereinafter “the Board”) embarked on an authentication and verification exercise of academic and professional certificates of County employees in the Department of Health Services serving in Job Groups “P”, “Q” and “R” as communicated in a Memo dated 6th March 2023. That in a subsequent Memo dated 4th April 2023, it was communicated to the said affected employees that they were to appear before the Board on 13th – 14th April 2023 for authentication of their academic and professional certificates, which exercise was also to address human resource audit and head count issues. That despite this communication, the Applicant failed to heed the said directive without any written communication and warranted the Board to take disciplinary action against him pursuant to the law. That to that effect, the Board at its Regular Board Meeting held on 26th April 2023, resolved to stop with immediate effect the salaries of the Applicant and seven (7) other Officers until circumstances of their non-compliance with the Memo were established. Ms. Waiyaki further averred that the Legal Department of the 6th Respondent did write an Internal Memo to the County Public Service Board on 6th September 2023 informing them of the Court Order issued on 4th August 2023. It was her stance that the Board, at its Special Meeting held on 9th November 2023, resolved to authorise reinstatement of the Claimant/Applicant’s salary that had been suspended since June 2023. That the Board further directed the Applicant to present himself at its Thika’s offices for authentication of his academic and professional certificates on or before 5th December 2023.
4. In a Supplementary Affidavit dated 7th December 2023, the Claimant/Applicant responded and further averred that he forwarded his academic and professional certificates to the County’s HR Officer on 23rd May 2023 and that the same was acknowledged by one May Mwangi, DHRM. He argued that the Respondent had no basis to stop his salary when it did because they already had his documents and that he had not been paid his salary for the months of June 2023 to November 2023 notwithstanding that the Court directed for the same to be paid. Further, that since the Respondents never wrote to him to explain why they unprocedurally and unlawfully stopped his salary, he was thus not expected to file an appeal to any Body and that in any event, this Court has jurisdiction in the matter.

5. **Claimant/Applicant’s Submissions**

The Claimant Applicant submitted that since the Respondents had not exhibited any evidence that they have paid his salary as ordered by this Court, they are in contempt of the orders of this Honourable Court.

6. **Respondent’s Submissions**

The Respondent submitted that the issues for determination are:

- a. Whether the Application is fatally defective
 - b. Whether the Respondents are in contempt of this Honourable Court’s Orders issued on 4th August, 2023.
 - c. Whether the Applicant is entitled to the reliefs sought.
7. As a preliminary point, the Respondents submitted that the Claimant admitted to have submitted his certificates on 23rd May 2023, which timing was approximately one month after the submission date



for such documentation had already lapsed and which therefore resulted in the Board stopping his salary. It was the Respondents' submission that this Honourable Court lacks the requisite jurisdiction to entertain this Application in accordance with section 77 of the County Governments Act, 2012 and section 87(2) of the Public Service Commission Act, 2017. That this was because the Applicant sought to irregularly invoke the jurisdiction of this Court by mischievously bypassing the available mandatory employee disciplinary mechanisms provided for under Article 234(2)(i) of the Constitution of Kenya and sections 85(c) and 87(2) of the Public Service Commission Act, 2017 on hearing and determination of appeals in respect of decisions emanating from the County Public Service Commission. In addition, Regulations 9, 10, 11, 12, 13, 15, 16, 17 and 21 of the Public Service Commission (County Government Public Services Appeals Procedures) Regulations, 2016 provide for the procedure of lodging and hearing appeals, including but not limited to, the attendant timelines involved thereat. The Respondents thus urged this Court to strike out the Claimant's Application with an attendant order as to costs in favour of the Respondents.

8. On the issue of contempt of this Court's Orders, the Respondents cited the case of Gatharia K. Mutikika v Babarini Farm Ltd [1985] KLR 227 where it was held that, "it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not." They further cited the case of Oilfield Movers Ltd v Zahara Oil & Gas Limited [2020] eKLR in which the Court stated that the threshold for a finding of contempt is quite high as it involves possible deprivation of a person's liberty. The Respondents noted that the standard of proof in contempt proceedings (such as in the instant case) must be higher than proof on the balance of probabilities as was noted by the Court of Appeal in the Gatharia K. Mutitika v Babarini Farm Limited case (*supra*). That accordingly, it is of utmost importance for the Applicant to establish that the alleged contemnor's conduct was deliberate in the sense that they wilfully acted in a manner that flouted the Court Order. The Respondents submitted that they had shown the steps they took towards ensuring full compliance with the Court Order of 4th August 2023 as extrapolated in their sworn affidavits of 20th November 2023 and 4th December 2023.
9. It was the Respondents' submission that the Claimant/Applicant's Notice of Motion dated 25th September 2023 does not satisfy the prerequisites for this Honourable Court to grant the orders sought and should be dismissed with costs to the Respondents. On this submission, they relied on the analysis and findings of Mativo J. (as he then was) in the case of Samuel M. N. Mweru & others v National Land Commission & 2 others [2020] eKLR.
10. The Claimant/Applicant seeks to have the Respondents cited for contempt. The Respondents in answer assert that despite their view that the Court lacks jurisdiction to entertain the matter on account of section 77 of the County Governments Act, they had reinstated the Claimant's salary. That there was also no basis for the grant as the Claimant/Applicant did not meet the threshold for grant of the orders sought.
11. In order to found action in contempt, the words of Mativo J. (as he then was) in the case of Samuel M. N. Mweru & others v National Land Commission & 2 others (*supra*) are instructive. The Learned Judge stated thus–

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- “ 40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove
 - (i) the terms of the order,



(ii) Knowledge of these terms by the Respondent,

(iii) Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated:-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate." (Emphasis supplied)

12. In the matter before me, there is no demonstration that the Respondents have acted in breach of the terms of the order nor is there proof that the Respondents conduct in that regard is deliberate – or in other words, there is no proof of wilful disobedience of the court order. The Claimant was required to take certain steps towards his obligations as an employee and it is doubtful that the threshold for a finding for contempt has been met. As such, I decline to find the Respondents in contempt and order the parties to bear their own costs for the motion that I hereby dismiss.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

