



**Njagi v Tharaka Nithi County Government (Cause 7 of 2020)
[2024] KEELRC 599 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 599 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE 7 OF 2020
ON MAKAU, J
MARCH 8, 2024**

BETWEEN

STEPHEN MUNENE NJAGI CLAIMANT

AND

THARAKA NITHI COUNTY GOVERNMENT RESPONDENT

RULING

1. On 8th December, 2017 the Court entered judgement for the claimant in this matter in the following terms:
 - a. The declaration that the revocation of the 1st Claimant's confirmation in the position of Assistant Director Administration as conveyed in the letter of 30.05.2017 and the revocation of the appointment or promotion of the 2nd Claimant as Director, Education, Youth, Sports, Gender and Social Services and as conveyed in the letter dated 30.08.2017 infringed upon the Claimants' respective rights to due process and natural justice as protected under section 76(1) and (2) of the [County Governments Act, 2012](#).
 - b. The order of prohibition which is hereby issued prohibiting the Respondent from demoting or removing the 1st Claimant from the position of Personal Assistant, Job Group N as appointed by letter dated 28.08.2014 except in accordance with the law and terms of the contract of employment and the 1st Claimant shall continue in the service of the Respondent accordingly.
 - c. The Declaration is hereby issued that the purported variation on 3rd May 2017 of the 1st Claimant's contract of employment made on 2nd September 2017 was unlawful, null and void.
 - d. The Declaration which is hereby issued that, in absence of parties' agreement to the contrary, the 2nd Claimant's employment as a project officer in the Respondent's establishment will lapse on the date of this judgement per the interim orders in place and as read with the letter of offer of appointment dated 28.03.2015 and that, but for the interim orders, the contract



of employment would otherwise have lapsed on 31.10.2017 in accordance with the parties' express agreement in that regard.

- e. Each party shall bear own costs of the proceedings.
2. The respondent failed to reinstate the Claimant and he brought the Notice of Motion dated 8th December, 2021 seeking the following orders: -
 - a. That this Court be pleased to find the County Secretary of the Respondent in Contempt of court.
 - b. The contemnor be committed to civil jail for such terms as this Court may deem fit unless or until they purge their contempt by honouring this Court's judgement and orders issued on the 8th Day of December 2021.
 - c. The cost of this Application be borne by the Respondents.
 3. The Application is supported by the applicant's affidavit sworn on the same date. In brief, he deposed that the Respondent has refused to reinstate him to the position of Personal Assistant and also to pay his salary since November 2017; and that when he reported to work on 11th December 2017, he was turned away by the County Secretary stating that there was no office for him.
 4. He further deposed that the Respondent's application for stay of execution dated 17th December 2017 was dismissed by the Court on 22nd November 2018 and on 29th January 2018 the Respondent served him with a notice requiring him to show cause why his employment should not be dismissed for gross misconduct. He responded through his advocates by a letter dated 5th February 2018 indicating that the show cause notice was sub-judice and tantamount to interfering with the Court's jurisdiction in an active and pending suit between parties.
 5. The Respondent terminated the Applicant's employment vide a letter dated 25th June 2018 for gross misconduct. Resultantly, his advocates vide their letter of 26th June 2018 responded to the termination letter stating the same amounted to defiance of court orders in the judgment rendered on 8th December 2017 which was never appealed against, set-aside or reviewed. As such the Applicant contended that his salary was never paid since October 2017 and continues to accrue. He further deposed that the Respondent had no power to render a verdict in a disciplinary matter already submitted to the jurisdiction of the Court.
 6. The Applicant contended that he again reported to his duty station on 28th November 2018 but the County Secretary, Mr. Fredrick Kamunde in the presence of the Legal Officer Ms. Lillian Kiruja, informed him that he stood fired. He further advised him to go back to Court as the Respondent's decision remained intact. He then filed contempt of court proceedings which were struck out for having been brought under the Contempt of Court Act which had been declared unconstitutional. He filed another application on 12th October 2020 which was also struck out on the basis of legal technicalities. Hence the Instant motion after his demand for compliance yielded no response. Consequently, he urged the Court to take action against the contemnors.
 7. The Respondent, responded to the motion by filing a Notice of Preliminary objection which was dismissed for lack of merits. Thereafter, the respondent filed a second response by way of a Replying Affidavit but again I struck out the same for being incompetent. However, I gave leave to the respective officer who was targeted by the contempt proceedings to file his own response.
 8. Mr. Alexander Micheni Muratha, the Respondent's County Secretary, then filed a Replying Affidavit dated 24th July 2023. In brief, he deposed that the Application is directed to persons who are not parties



to the suit; that no decree has been extracted pursuant to Order 21 Rule 7 of the Civil Procedure Order and as such the contempt proceedings are not well founded; that the application is fatally defective for failure to name the particular officer of the respondent who are targeted by the contempt proceedings; and that the application is also fatally defective for failure to set out the particulars of the contempt to enable the respondent to know the case against him. He buttressed that argument by citing the case of Mutitika v Baharini Farm Ltd [1985] eKLR.

9. He deposed that the judgement of the Court ordered against the removal of the Applicant except in accordance with law of employment. He stated that the Applicant was invited to show cause why his employment should not be terminated, which invitation he dishonoured. Hence the termination of his employment on 25th June 2018 was in accordance with the law and it extinguished the judgment rendered on 8th December 2017 by operation of the law.
10. In view of the foregoing, he contended that no contempt proceedings can be sustained against him and/or his predecessor in office Mr. William M'Birichia. He further deposed that there is no contract of service capable of being enforced by contempt proceedings since even the court observed in its ruling rendered on 22nd November 2018, that the claimant's contract of employment had already expired by effluxion of time.
11. He deposed that the Applicant has not proved the alleged contempt to the required standard of proof as enunciated in Mutitika v Baharini Farm Ltd [1985] eKLR, *supra*. Consequently, he contended that the application is an abuse of court process as it was intended to extort money from the Respondent. He placed reliance on the definition of abuse of court process by I.H. Jacob at pages 40-41 of the 1970 issue of the Current Legal Problems.
12. He deposed further that the Respondent's disciplinary proceedings were analogous to those of the Court and hence the Applicant's termination followed his ignorance of the termination proceedings. It was stated that the Applicant's Advocate's letters were responded to by the Respondent's advocates who intimated that the Respondent would exercise its managerial prerogative and proceed with the show cause proceedings. He deposed that the Court cannot interfere with the managerial prerogative of the employer in connection with invocation of internal disciplinary processes as was held in Nairobi Industrial Cause No 620 of 2013 Alfred Nyungu Kimungui v Bomas of Kenya and in Rebecca Anne Maina and others v Jomo Kenyatta University of Agriculture and Technology, Nairobi ELRC Cause No 1789 of 2013.
13. He reiterated that the Applicant's employment was lawfully terminated on 25th June 2018 as per section 59 of the County Governments Act, 2012 (CGA). He stated that upon termination, the Applicant had right of appeal to Public Service Commission under section 77 of CGA. He deposed that the relationship between the Applicant and the Respondent ended and thus the Applicant has no further claims against the Respondent and the purpose of this application is to extort money from the Respondent. Therefore, he denied the alleged contempt of court.

Applicant's submissions

14. The applicant filed written submissions dated 30th November 2023, in which he framed the following issues for determination:
 - a. Whether the Respondent can lawfully mount any other response to the Claimant's application after the striking out of both its preliminary objection dated 21st March 2021 and subsequent replying affidavit sworn on 24th October 2022.



- b. Whether the Court permitted the Respondent to file another replying affidavit vide its ruling of 14th July 2023.
 - c. Effect of leave granted to file second replying affidavit against the contempt application.
 - d. Whether Claimant's contempt application dated 8th December 2021 is granted as prayed.
15. As regards the first issue, the Applicant submitted that his Application dated 8th December 2021 could not be assaulted by the Respondent's replying Affidavit dated 24th July 2023. He contended that his Application was brought under Order 51 of the Civil Procedure Rules (CPR), which provides under Rule 14, the optional responses to be filed in opposition of the application. The Respondent opted for a preliminary objection which was dismissed vide a ruling rendered on 16th September 2022. Subsequently, he filed a Replying Affidavit filed which was also struck out for abuse of court's process vide ruling of 14th July 2023. Consequently, the applicant contended that the respondent is estopped from filing any other response to the instant motion.
 16. Reliance was placed on Rule 17 (9) of this Court's Rules and the case of John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another [2016] eKLR where the Court adopted the decision in Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd [2] where Sir Charles Nwebold P at page 701, B- held that: -

“...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
 17. It was submitted that this Court is bound by the Principles in *Mukhisa Biscuit case* and if the Court is going to consider the Respondent's affidavit, it would mean that it has overturned the said principles, and its earlier ruling of 14th July 2023.
 18. It was therefore submitted that the impugned affidavit lacks merit, is devoid of any legal basis, is an affront to the elements of a fair trial and is a ripe candidate for striking out for being an abuse of court process.
 19. On the second issue, the Applicant submitted that the Court did not grant the Respondent the liberty to file another affidavit as its first affidavit was struck out for offending the spirit of Order 51 Rule 14 of the CPR. It was argued that by the court inviting the Respondent to exploit any other avenues meant the option of settling the matter out of court. It was observed that the striking out of the Respondent's earlier Affidavit, is the subject matter of an appeal since the Respondent lodged a Notice of Appeal against the said ruling.
 20. With respect to the third issue, it was submitted that the Court was bound by its ruling and could therefore not purport to grant leave for an action it expressly disallowed based on the law. It was submitted that the Court's record indicated that the Applicant's objection to the granting of leave never made it to the court record. It was argued that the Court acted ultra vires and occasioned an injustice by granting leave to file the affidavit, despite its order striking out the first affidavit.
 21. It was further submitted that the rules did not permit the filling of additional documents save for a supplementary affidavit. It was argued that the leave granted should therefore be viewed as an order in vain. This Court was therefore invited to exercise its inherent jurisdiction under section 3A of the Civil Procedure Act to clear the confusion created. He submitted that it was in interest of justice that the impugned affidavit be struck out and not be considered in the determination of this Application.



22. On the fourth issue, it was submitted that the Applicant's application remained unchallenged after the dismissal of the Preliminary Objection and the striking out of the Respondent's Affidavit and thus be determined ex-parte. It was contended that the Respondent's conduct amounted to an admission of facts as per Order 13 Rule 2 of the [CPR](#) and thus this Court should determine the issue on contempt first without regard to other issues. It was submitted that from the Application, it was evident that the Respondent's contemptuous acts were deliberate and mala fide. It was therefore prayed that the application be allowed with costs.

Respondent's submissions

23. The Respondent filed written submissions dated 6th November 2023 where it submitted that as per Order 21 Rule 7 of the [CPR](#), contempt of Court proceeding could only be founded on an extracted order/decreed but none has been extracted to date. In support of its argument that the application should fail, it relied on the case of [Daniel Otieno Okun v Kenyatta University](#) [2020] eKLR under paragraphs 39-43.
24. It was submitted that the proceedings were fatal as they were not directed to a particular officer of the Respondent. It was argued that various persons held the office of County Secretary and the Applicant didn't show which one of the respondent's officers was in breach. It was submitted that the particulars of the alleged contempt were not set out to enable it know the case against it. It contended that the standard of proof laid out in the case of [Mutitika v Baharini Farm Ltd](#) [1985] eKLR was not met. It was argued that there was no contempt of court proceedings that could be brought after the termination of the Applicant's employment on 25th June 2018. It also submitted that this Court on 22nd November 2018 held that the Applicant's contract of service had expired and thus no contract of employment could be enforced through these proceedings. Reliance was placed on the case of [William Malii Mwanzia v General Motors East Africa Limited](#) [2018] eKLR and the case of [Kenya Private Universities Workers Union v Presbyterian University of East Africa](#) [2019] eKLR.
25. It was further submitted that the application was an abuse of the court's process as it was not honestly made but only aimed at extorting money from the Respondent. Reliance was placed on the definition of Abuse of the process of the Court by I.H. Jacob at page 40-41 of '[The inherent Jurisdiction of the Court](#)' in the 1970 issue of the Current Legal Problems.
26. It was reiterated that the proceedings of the disciplinary committee were analogous to court proceedings and as such a verdict was entered in the absence of the Applicant by the Board that lawfully terminated his employment. It was submitted that the Applicant had the option of an appeal to PSC but opted to not do. Section 90 of the [Employment Act](#) was invoked to urge that the three-year limitation period within which to file suits challenging termination had already lapsed.
27. On the issue on costs, it was submitted that costs are awarded at the court's discretion that must be exercised judicially. Reliance was placed on the cases of [Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others](#) [2014] eKLR and [Republic v Communication Authority of Kenya & another Ex-Parte Legal Advice Centre Aka Kituo Cha Sheria](#) [2015] eKLR. In the end respondent urged the court to dismiss the Application with costs.

Issues for determination and analysis

28. Having considered the Application, the Response and the parties' submission, the issues falling for determination by this Court are:
- a. Whether the Respondent's Affidavit dated 24th July 2023 is properly before the Court.



- b. Whether the application herein is fatally defective and an abuse of the process of the Court.
- c. Whether the respondent's County Secretary is in contempt of court with respect to the judgment delivered on 8th December, 2017.
- d. Which orders should the court make?

Whether the Respondent's Affidavit dated 24th July 2023 is properly before the Court.

29. The Applicant argued that the affidavit sworn by the Respondent's County Secretary on 24th July 2023 should be expunged from the Court's record as the same was filed without any legal backing. He further argued that the Court vide its ruling rendered on 14th July 2023, struck out an affidavit sworn 24th October 2022 by William Micheni M'Birichi, the Respondent's County Secretary on behalf of the Respondent for offending Order 51 Rule 14 of the *Civil Procedure Rules*. The court held that the Respondent had already assaulted the application by filing a Notice of Preliminary Objection which was dismissed, and therefore the respondent was estopped from having a second bite of the cherry.

30. The Court in its said Ruling stated as follows:

“The following does not however bar the respective officer of the Respondent who is targeted for the punishment, from being heard in the application. I say so because the proceedings for contempt must be directed at some individual and not the Respondent. Holding otherwise would mean that a person will be condemned unheard.

... the officers targeted by the contempt proceedings have the liberty to respond to the motion as provided by law...”

31. The above holding is self-explanatory. The Court granted the leave to the officer targeted by the contempt proceedings, to file a response to defend himself. Based on the said leave, the officer concerned filed the impugned replying affidavit which is basically a replica of the one sworn on 24th October 2022 by the former county Secretary Mr. William, save for the fact that the paragraphs were rearranged. Suffice it to say that the impugned replying affidavit was filed with the leave of the court and it is properly on record.

Whether the application herein is fatally defective and an abuse of the process of the Court.

32. The respondent faulted the application for failing to name the individual persons who are in contempt; failing to extract the decree being enforced through the contempt proceedings; and failing to set out the particulars of the alleged contempt. The applicant did not rebutt the above allegations. However, with respect to the failure to extract the decree, I must state that the ground has shifted so that all what is necessary is for an applicant to show that the respondent was aware of the judgment or the ruling in issue.

33. There can be no doubt that the respondent herein was aware of the judgment of the court rendered on 8th December,2017. I say so because the County Secretary in his replying affidavit deposed that the court only barred the respondent from terminating the applicant's employment except through the lawful means. He contended that, consequent to the said judgment, the respondent initiated disciplinary process against the applicant but he declined to participate resulting to a termination.



34. I gather support from the case of *Basil Criticos v Attorney General & 4 others* [2012] e-KLR where Lenaola J (as he then was) held that:

“... the law has changed and so as it stands today, knowledge supersedes personal service and for good reason... where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that service must be proved is rendered unnecessary.”

35. As regards the alleged failure to plead the particulars of the breach, I find that the applicant has stated the same in the motion and the supporting affidavit, that is, failure to reinstate him to his job and pay his salary.

36. The foregoing notwithstanding, I agree with the County Secretary that the contempt proceedings seeks to enforce the judgment prematurely. The decree has not been extracted as required under Order 21 Rule 7 of the *Civil Procedure Rules*. There is also no order against the government that has been issued as required under section 21 of *Government Proceedings Act*. Further, no writ of *mandamus* has been sought and issued against the County Secretary who is targeted by contempt proceedings.

37. In the case of *Republic v The Attorney General & another Ex parte 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.”

38. The facts before me are in consonance with the above decision which I am persuaded to adopt. The principle of law emerging from the said decision is that a party cannot enforce against an officer of the government outside the procedure set out by the *Government Proceedings Act* and before obtaining a writ of *mandamus* against the concerned officer. Consequently, I find and hold that the contempt proceedings against an officer of the respondent herein is premature and fatally incompetent.

Whether the respondent’s County Secretary is in contempt of court with respect to the judgment delivered on 8th December, 2017.

39. Having found that the contempt proceedings were commenced prematurely, I see no need of proceeding with the application any further since it has no life. Consequently, I strike it out with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF MARCH, 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

